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**CASES**  
**OF**  
**CONTESTED ELECTIONS**  
**IN CONGRESS,**

**FROM THE YEAR 1789 TO 1834, INCLUSIVE.**

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**COMPILED BY**  
**M. ST. CLAIR CLARKE,**

**LATE CLERK OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES,**

**AND**

**DAVID A. HALL.**

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**PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES.**

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## PREFACE.

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IN explanation of the following work, it may be necessary, by way of preface, to make one or two remarks illustrative of its plan. The first object was to bring together the entire proceedings of Congress upon each case of contested elections that had occurred since the adoption of the federal constitution; and, secondly, to give to the whole, such a form, that the points deemed important in each should be presented prominently to the reader, and in a manner fitted to arrest his attention. With this view, a summary is placed at the head of each case, intended to embody, in a brief space, the points decided in that case. To avoid error, however, it must be remarked that this summary, or synopsis of points decided, does not in general give the decisions of the House, but only of the Committee of Elections. The duty of that committee is to examine and report its opinion upon such matters as shall be referred to them by the House; but their opinion, though clothed with authority, is not conclusive upon the House: it may be, and not unfrequently is, there overruled. The usage of the committee is, after an examination into the facts of the case, to elaborate a report, in which these facts are set forth with an accuracy hitherto unquestioned: from these, they deduce their reasons for supporting the one or the other candidate, and report their opinion accordingly to the House, both at large, and in the form of a condensed resolution. It is upon this resolution, and not upon the reasons or arguments of the committee, that the House act: and whether they have concurred with the committee in their views of the case, will not appear as a matter of record on their journals. These will only show whether they have accorded with them in the final result, but will not show how far the House have sanctioned the reasonings of the committee. It must be borne in mind, therefore, that the summary is intended briefly to note the points decided *by the committee* in each case, and does not profess authoritatively to give the judgment of the

*House* thereon. But, if the House do not dissent from the *conclusion* of the committee, they may, in general, be presumed to have sanctioned the process of reasoning by which it has been attained.

These remarks will apprise the reader how far the decisions of the committee are to be received as authority: they are not conclusive, it will be seen, unless sanctioned by the House. The action of the House, in each case, has been given; and, with a view to explain more fully the views of that body, the debates and speeches of individual members have been inserted, as far as they were attainable, with the exception of two or three of the later cases. By this ample collection of all matters having a bearing upon contested elections in Congress, the volume has been swelled much beyond the limits originally intended by the compilers: but this increase of bulk will not, it is hoped, be thought to detract from its merits. If it be important to the security of the elective franchise, that just and uniform rules of decision should be observed, on a subject so deeply involving the rights of American freemen, it cannot be deemed a useless labor to have furnished a repository in which may be found treasured all the precedents of contested elections which the practice of fifty years has produced.

## INTRODUCTION.

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IN a republican Government, like that with which the people of the United States are blessed, where all power is admitted to emanate from those for whose benefit it is brought into exercise, it becomes a matter of the highest import, to inquire when, by what rules, and in what manner, it is properly delegated to the agents of the people. The only source of information, upon these points, is the true and authentic one, the constitution of the United States. All the powers with which any officers of the General Government are entrusted, must be referred for their origin, more or less directly, to this instrument.

The constitution vests all the legislative power which can be exercised under the Government of the United States, in a Congress consisting of a Senate and House of Representatives, and it defines, by rules the most simple and comprehensive, the qualifications necessary to the members of each House, as follows :

### *Qualifications of Senators of the United States.*

#### ART. I. —SECTION III.

“ The Senate of the United States shall be composed of two Senate, how  
Senators from each State, chosen by the Legislature thereof, for six chosen.  
years ; and each Senator shall have one vote.

“ Immediately after they shall be assembled, in consequence of Senators  
the first election, they shall be divided as equally as may be into classed.  
three classes. The seats of the Senators of the first class shall be  
vacated at the expiration of the second year ; of the second class at  
the expiration of the fourth year ; and of the third class at the ex-  
piration of the sixth year ; so that one-third may be chosen every  
second year : and if vacancies happen, by resignation or otherwise,  
during the recess of the Legislature of any State, the Executive  
thereof may make temporary appointments until the next meeting  
of the Legislature, which shall then fill such vacancies.

“ No person shall be a Senator who shall not have attained to the Senator's qua-  
age of thirty years, and been nine years a citizen of the United lifications.  
States, and who shall not, when elected, be an inhabitant of that  
State for which he shall be chosen.”

*Qualifications of Members of the House of Representatives.*

## ART. I.—SECTION II.

Members  
House of Re-  
presentatives,  
how chosen.

“The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Qualifications  
of members  
House of Re-  
presentatives.

“No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Vacancies,  
how filled.

“When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.”

## SECTION IV.

Elections, how  
held.

“The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

Congress as-  
semble annu-  
ally.

“The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.”

## SECTION V.

Elections, how  
judged.

“Each House shall be the judge of the elections, returns, and qualifications, of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.

Quorum, Se-  
nate and House  
of Representa-  
tives.

Rules.

“Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.”

## SECTION VI.

Members not  
appointed to  
office.

“No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States shall be a member of either House during his continuance in office.”

The above are believed to embrace all those portions of the constitution which have any bearing upon the elections or qualifications of members of either House of Congress.

By the fourth section of the first article, it will be seen that though the power is reserved to the States of prescribing the “times, places, and manner” of holding elections, yet that Congress may alter such regulations, except as to the *places* of

choosing Senators. Upon this it may be necessary to remark, that, at the first session of the first Congress, among a variety of amendments proposed to be made to the constitution, as originally framed, was one to divest Congress of the power of making any such change in the State election laws, as by this section they are authorized to do. Upon this proposition the following debate took place:

*Debate in Congress on the 21st August, 1789, on amendments proposed to be made to the constitution, in regard to the power of Congress over the subject of elections of members of Congress.*

[From Lloyd's Debates, Vol. II, p. 244.]

Mr. BURKE, of South Carolina, said, I move you, sir, to add to the articles of amendment the following: "Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections of Senators or Representatives, except when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such elections."

Mr. AMES thought this one of the most justifiable of all the powers of Congress. It was essential to a body representing the whole community, that they should have power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations calculated to answer party purposes only. It is a solecism in politics to let others judge for them, and is a departure from the principles upon which the constitution was founded.

Mr. LIVERMORE said this was an important amendment, and one that had caused more debate in the convention of New Hampshire than any other whatever. The gentleman just up said it was a solecism in politics, but he could cite an instance in which it had taken place. He only called upon gentlemen to recollect the circumstance of Mr. Smith's (of South Carolina) election, and answer him, was not that decided by State laws? Was not his qualification as a member of the Federal Legislature determined upon the laws of South Carolina? It was not supposed by the people of South Carolina that the House would question a right derived by their Representative from their authority.

Mr. MADISON. If this amendment had been proposed at any time, either in the Committee of the Whole, or separately in the House, I should not have objected to the discussion of it. But I cannot agree to delay the amendments now agreed upon, by entering into the consideration of propositions not likely to obtain the consent of either two-thirds of this House, or three-fourths of the State Legislatures. I have considered this subject with some degree of attention, and, upon the whole, am inclined to think the constitution stands very well as it is.

Mr. GERRY was sorry that gentlemen objected to the time and manner of introducing this amendment, because it was too important in its nature to be defeated by want of form. He hoped, and he understood it to be the sense of the House, that each amendment should stand upon its own ground; if this was, therefore, examined on its own merits, it might stand or fall as it deserved, and there would be no cause for complaint on the score of inattention. His colleague (Mr. AMES) objected to the amendment, because he thought no Legislature was without the power of determining the mode of its own appointments, but he would find, if he turned to the constitution of the State he was a Representative of, that the times, places, and manner of choosing members of their Senate and Council were prescribed therein. Why, said he, are gentlemen desirous of retaining this power? Is it because it gives energy to the Government? It certainly has no such tendency. Then why retain a clause so obnoxious to almost every State? But this

provision may be necessary in order to establish a Government of an arbitrary kind, to which the present system is pointed in no very indirect manner. In this way, indeed, it may be useful. If the United States are desirous of controlling the elections of the people, they will, in the first place, by virtue of the powers given them by the 4th section of the 1st article, abolish the mode of balloting; then every person must publicly announce his vote; and it would then frequently happen that he would be obliged to vote for a man, or the friend of a man, to whom he was under obligations. If the Government grows desirous of being arbitrary, elections will be ordered at remote places, where their friends alone will attend. Gentlemen will tell me that these things are not to be apprehended; but if they say that the Government has the power of doing them, they have no right to say the Government will exercise those powers, because it is presumable that they will administer the constitution, at one time or another, with all its powers; and whenever that time arises, farewell to the rights of the people even to elect their own Representatives.

Mr. STONE called upon gentlemen to show what confederated Government had the power of determining on the mode of their own election. He apprehended there was none; for the Representatives of States were chosen by the States in the manner they pleased. He was not afraid that the General Government would abuse this power, and as little afraid that the States would; but he thought it was in the order of things that the power should rest in the States respectively, because they can vary their regulations to accommodate the people in a more convenient manner than can be done in any general law whatever. He thought the amendment was generally expected, and, therefore, on the principles of the majority, ought to be adopted.

Mr. SMITH, of South Carolina, said he hoped it would be agreed to that eight States had expressed their desires on this head, and all of them wished the General Government to relinquish their control over the elections. The eight States he alluded to were, New Hampshire, Massachusetts, New York, Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina.

Mr. CARROLL denied that Maryland had expressed the desire attributed to her.

Mr. FITZSIMONS. The remark was not just as it respected Pennsylvania.

Mr. SMITH, of South Carolina, said the convention of Maryland appointed a committee to recommend amendments, and, among them, was the one now under consideration.

Mr. STONE replied there was nothing of the kind noticed on the journals of that body.

Mr. SMITH, of South Carolina, did not know how they came into the world, but he certainly had seen them. As to Pennsylvania, there was a considerable minority, he understood one-third, who had recommended the amendment. Now, taking all circumstances into consideration, it might be fairly inferred that a majority of the United States was in favor of this amendment. He had studied to make himself acquainted with this particular subject, and all that he had heard in defence of the power being exercised by the General Government, was, that it was necessary, in case any State neglected or refused to make provision for the election. Now, these cases were particularly excepted by the clause proposed by his honorable colleague, and, therefore, he presumed there was no good argument against it.

Mr. SEDGWICK moved to amend the motion, by giving the power to Congress to alter the times, manner, and places of holding elections, provided the States made improper ones; for, as much injury might result to the Union from improper regulations, as from a neglect or refusal to make any, it is as much to be apprehended that the States may abuse their powers, as that the United States may make an improper use of theirs.

Mr. AMES said that inadequate regulations were equally as injurious as having none, and that such an amendment as was now proposed would alter the consti-



tution ; it would vest the supreme authority in places where it was never contemplated.

Mr. SHERMAN observed that the convention were very unanimous in passing this clause ; that it was an important provision, and, if it was resigned, it would tend to subvert the Government.

Mr. MADISON was willing to make every amendment that was required by the States, which did not tend to destroy the principles and the efficacy of the constitution. He conceived that the proposed amendment would have that tendency ; he was, therefore, opposed to it.

Mr. SMITH, of South Carolina, observed that the States had the sole regulation of elections, so far as it respected the President. Now, he saw no good reasons why they should be indulged in this, and prohibited from the other ; but the amendment did not go so far ; it admitted that the General Government might interfere whenever the State Legislature refused or neglected ; and it might happen that the business would be neglected without any design to injure the administration of the General Government ; it might be that the two branches of the Legislature could not agree, as happened, he believed, in the Legislature of New York, with respect to their choice of Senators at their late session.

Mr. TUCKER objected to Mr. Sedgwick's motion of amendment, because it had a tendency to defeat the object of the proposition brought forward by his colleague, (Mr. BURKE.) The General Government would be the judge of inadequate or improper regulations ; of consequence, they might interfere in every law which the States might pass on that subject. He wished that the State Legislatures might be left to themselves to perform every thing they were competent to, without the guidance of Congress. He believed there was no great danger, but they knew they would pursue their own good as well when left to their discretion, as they would under the direction of a superior. It seemed to him as if there was a strong propensity in this Government to take upon themselves the guidance of the State Governments, which, to his mind, implied a doubt of their capacity to govern themselves. Now, his judgment was convinced that the particular State Governments could take care of themselves, and deserved more to be trusted than this did, because the rights of the citizens were more secure under it.

It had been supposed by some States that electing by districts was the most convenient mode of choosing members to this House. Others have thought that the whole State ought to vote for the whole number of members to be elected for that State. Congress might, under like impressions, set their regulations aside. He had heard that many citizens of Virginia (which State was divided into eleven districts) supposed themselves abridged of nine-tenths of their privileges, by being restrained to the choice of one man instead of ten, the number that State sends to the House. With respect to the election of Senators, the mode is fixed ; every State but New York has established a precedent ; there is, therefore, but little danger of any difficulty on this account. As to New York, she suffers by her want of decision ; it is her own loss ; but probably they may soon decide the point, and then no difficulty can possibly arise hereafter. From all these considerations, he was induced to hope Mr. Sedgwick's motion would be negatived, and his colleague's agreed to.

Mr. GOODHUE hoped the amendment never would obtain. Gentlemen should recollect there appeared a large majority against amendments, when the subject was first introduced, and he had no doubt but that majority still existed. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence.

Mr. BURKE was convinced there was a majority against him, but, nevertheless, he would do his duty, and propose such amendments as he conceived essential to secure the rights and liberties of his constituents. He begged permission to make an observation or two not strictly in order ; the first was on an assertion

that had been repeated more than once in this House, "that this revolution or adoption of the constitution was agreeable to the public mind, and that those who opposed it at first are now satisfied with it." I believe, sir, said he, that many of those gentlemen who agreed to the ratification without amendments, did it from principles of patriotism; but they knew, at the same time, that they parted with their liberties; yet they had such reliance on the virtue of a future Congress, that they did not hesitate, expecting that they would be restored to them unimpaired as soon as the Government commenced its operations, conformably to what was mutually understood at the sealing and delivering up those instruments. It has been supposed that there is no danger to be apprehended from the General Government, of an invasion of the rights of elections. I will remind gentlemen of an instance in the Government of Holland. The patriots in that country fought no less strenuously for that prize than the people of America; yet, by giving to the States general powers, not unlike those in this constitution, their right of representation was abolished. That they once possessed it, is certain; and that they made as much talk about its importance as we do; but now the right has ceased, all vacancies are filled by men in power. It is our duty, therefore, to prevent our liberties from being fooled away in a similar manner; consequently, we ought to adopt the clause which secures to the General Government every thing that ought to be required.

Mr. MADISON observed that it was the State Governments in the Seven United Provinces which had assumed to themselves the power of filling vacancies, and not the General Government; therefore, the gentleman's application did not hold.

The question on Mr. Sedgwick's motion for amending, was put, and lost.

The question was then put on Mr. Burke's motion, which was decided in the negative. Ayes, 23. Noes, 28.

At the first session of the nineteenth Congress, a proposition was made to alter the election laws of several of the States in an important particular, the nature of which alteration will appear from the resolution itself, which is as follows:

DECEMBER 22, 1825.

On motion of Mr. Allston, of North Carolina,

*Resolved*, That a committee be appointed to inquire into the propriety of altering the election laws of the several States, so as to provide that no election shall take place for members of the House of Representatives of the United States until the term of service shall have expired for which they had been elected, and that the committee have leave to report by bill or otherwise."

This resolution was referred to a select committee, who, on the 16th of May, 1826, reported "that it is inexpedient at this time to make any change in the election laws of the several States."

Thus the mode of electing members of Congress stands now as it did under the constitution as originally formed. But whatever be the rules or laws of election, and these are nearly as various as the States of the Union, contests will arise as to the practical application of them; the power of deciding on which is conveyed in this brief clause of the constitution: "Each House shall be the judge of the elections, returns, and qualifi-

cations of its own members." Of the manner in which this judgment is exercised, and the forms in which the evidence is produced, some notice will now be given.

*Of the Committee, and the evidence in cases of Contested Elections.*

On the institution of a Committee of Elections at the commencement of the first Congress, it was, by a resolution of the House of Representatives, made the duty of the said committee "to examine and report upon the certificates of election, or other credentials of the members returned to serve in this House, and to take into their consideration all such matters as shall or may come in question, and be referred to them by the House, touching returns and elections, and to report their proceedings, with their opinion thereupon, to the House."

Notwithstanding this delegation of power to the committee, it will be seen, from a view of their early proceedings, that they were in the frequent habit of referring to the House for specific directions as to the mode in which testimony should be taken. Sometimes, upon their own authority, as in the case of *Latimer vs. Patton*, (1st session of the 3d Congress,) they instructed the parties how their testimony should be taken, and in other cases, as that of *Jackson vs. Wayne*, this instruction emanated directly from the high authority of the House. In some instances testimony appears to have been taken orally before the committee; and it was probably in reference to that mode of proof that it was, on the 12th of December, 1793,

"*Ordered*, That the standing Committee of Elections have power to send for persons, papers, and records, for their information."

On the 28th of December, 1795, it was, on motion,

"*Ordered*, That, in addition to the powers before given to the Committee of Elections, they be authorized to direct the taking of depositions in any cases where it may be impracticable or inconvenient for the witnesses to give their personal attendance, and to prescribe the mode."

The inconvenience both of oral proof and of written testimony taken in the various forms in which interested parties might suggest, was soon felt, and as early as the 31st of October, 1791, a proposition was made, and a committee appointed, to report a regular and uniform mode of taking testimony in cases of contested elections; but no action of the House appears to have grown out of this appointment.

On the 16th of February, 1796, a resolution was submitted to the House for prescribing the mode in which testimony should be taken, but it was not acted on. Similar but more specific resolutions were offered on the 9th of February, 1797, and com-



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some regulation was certainly necessary, both as to elections, and as to all other matters of controversy which may come before the House; because, if some mode were adopted for taking evidence, facts might be brought before the House which could never otherwise come. As it respected elections, they knew it had happened in one instance, and might happen in many, that a person had held a seat in that House for a whole session, who was not entitled to it. He saw no difficulty in passing and prescribing the mode of taking affidavits to be laid before the two Houses of Congress. He should venture to move that the committee rise, with the intention of discharging it from a further consideration of the subject, and to propose that a committee be appointed to inquire into the expediency or inexpediency of prescribing a mode for taking evidence generally, for the purpose of laying it before Congress.

Mr. HARPER said, if the gentleman just sat down had no other reason than that which he had assigned for making his motion, he thought, on consideration, he would not himself think it necessary. His whole objection to the resolutions seemed to be to the notice required to be given. Here was no intention, he said, of precluding evidence after the time specified. The sole object was, that testimony taken in this way, and no other, should be admitted. Persons wishing to have the time extended, might still take the evidence in this way. If there was a doubt on the subject, an additional clause might be introduced to this effect. Whether the mode he had proposed was the best which could be adopted, he could not say. If gentlemen knew a better, he wished them to propose it, and let it be considered; but surely, because gentlemen think some better mode may be devised, this was not a sufficient reason for discharging the Committee of the Whole from a further consideration of the subject.

Mr. GORDON was in favor of the committee's rising, because he did not think the resolution would have any effect if carried. He was of opinion with the gentleman from Pennsylvania, (Mr. SITGREAVES,) that they could not pass a rule to bind a future House; though he thought a law might be passed to do away the inconvenience complained of. These inconveniences arose from there being no law obliging witnesses to give their deposition in the cases mentioned. If such a law were passed, all that was complained of would be done away.

Mr. HARPER said, if the House could not pass a law upon the subject to have effect, then it was idle to talk about it. One word upon the committee's rising. Was it proper, he asked, after the present subject had been before the House two years, merely because gentlemen had not given themselves the trouble to make themselves acquainted with the business, because they have not prepared their objections or amendments, to have it sent to a new committee? He thought not. If gentlemen wished a day or two to consider the subject, he had no objection to give it; but he hoped the Committee of the Whole would not be discharged.

Mr. SITGREAVES supposed that, the question being for the committee to rise, it would be improper to go into the merits of the subject. He rose only to give an additional reason why the committee ought to rise. If the House passed any thing either in the form of a law or a resolution, the provisions necessary must embrace such a variety of detail as could not be settled in a Committee of the Whole, as they should be entered into with great caution and deliberation. Indeed, the mode of procedure adopted on this occasion inverted the usual order of things. The detail of business was always settled in select committee, and not in Committee of the Whole.

The motion for the committee's rising was put, and carried; and upon leave being asked to sit again, it was refused.

Two motions were then made, one by Mr. NICHOLAS, for referring the resolutions to a select committee; another by Mr. SEWALL, for appointing a committee to inquire into the expediency of passing a law regulating the taking of evidence generally. The former was withdrawn, to make way for the latter, but renewed

by Mr. RUTLEDGE; and, in order to do away some objections, which were urged against this mode of proceeding, Mr. HARPER proposed to amend the motion by adding this direction to the committee, viz. "to take the subject-matter itself under consideration, and report their opinion generally to the House." Agreed; and a committee of five members appointed.

At length, on the 23d of January, 1798, an act was passed prescribing a uniform mode of taking testimony, and for compelling the attendance of witnesses in these cases. It was limited in its duration to the end of the first session of the sixth Congress; but, by a subsequent act, passed on the 22d April, 1800, it was continued in force four years longer. [See United States Laws.]

On the 5th of June, 1798, it was, on motion,

*"Resolved,* That all copies of any papers recorded in any office of record, provided those copies be attested under the hand and seal of the recording officer, shall be admitted in all trials as aforesaid, [of contested elections,] in like manner as the originals would be, if produced; and that copies of any other papers of a public nature, and remaining in possession of any public officer, shall be admitted in like manner, when attested under the hand and seal of such officer."

On the 13th of January, 1805, a committee, in pursuance of an order of the House, brought in a bill to revive and make permanent the aforesaid act of the 23d of January, 1798, which bill was, on the 3d of March, 1805, passed by the House, but was rejected by the Senate.

On the 9th December, 1806, the same bill, or one of a similar character, was brought in, and for several days debated in Committee of the Whole; but, on the 2d of March, 1807, it was postponed indefinitely. The following is a copy of it:

HOUSE OF REPRESENTATIVES, 21st December, 1809.

"A bill to revive and make permanent 'An act to prescribe the mode of taking evidence in cases of contested elections for members of the House of Representatives of the United States, and to compel the attendance of witnesses,' and in addition to the same.

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled 'An act to prescribe the mode of taking evidence in cases of contested elections for members of the House of Representatives of the United States, and to compel the attendance of witnesses,' passed on the 23d day of January, in the year of our Lord 1798, be, and the same is hereby, revived and made permanent.

*"SEC. 2. And be it further enacted,* That when any person shall intend to contest the election, qualification, or return of a person returned as a member of the House of Representatives of the United States, he shall, within — days after the election shall have been declared, give notice, in writing, of such his intention, to the person so returned, and shall, at the same time, deliver to him a list of the persons, if any, to whose votes he intends to object, subjoining his objections to the names of such voters respectively; and also a statement of any other

objections intended to be made to the election, qualification, or return of the person so returned as aforesaid: and if the person so returned shall object to the qualification or election of any other candidate, he shall, within — days after receiving notice, as aforesaid, deliver to the other party a like list or statement on his part. Notice in any of the aforementioned cases, as well as the list and statements, left at the usual place of abode of the opposite party, shall be deemed sufficient.”

On the 31st December, 1810, another ineffectual effort was made to prescribe some general mode of taking testimony in cases of contested elections, and a bill for that purpose was brought in, but it does not appear to have been acted on.

Again, on the 10th of February, 1830, on the motion of Mr. SPENCER, of New York, the Committee of Elections were directed to inquire into the expediency of providing, by law, for the taking of testimony in such cases; but no report by that committee appears to have been made.

Of the manner in which the Committee of Elections is constituted, it may be proper to remark that, in the House of Representatives, it is, like that of all other committees, by the appointment of the Speaker; it may, by special direction of the House, be elected by ballot; but no instance of such election has occurred. It consists at present of nine, and the member first named on the list, is chairman.

In the Senate, the committees are appointed by ballot, the chairman being separately first elected, and the list then filled up by a distinct ballot; but the Committee of Elections there, is not a standing committee. When a contest arises in the Senate for a seat, the case has heretofore been referred to a select committee, elected as other committees are, and upon whose report the Senate has acted.

The modes of proceeding in the American Congress, in most instances, have a very striking analogy to those which bear the approval of an almost immemorial usage, in the British Parliament. In the presentation of papers, the introduction and reading of bills, the reference of subjects, the order of debate, and the ascertainment of the powers of the two Houses, this analogy is every where obvious. But, in regard to the constitution and action of this important Committee of Elections, our Congress has departed widely from the example which elsewhere they have so closely imitated. To enable the reader to compare the mode of proceeding in the British House of Commons with that of our own Legislature, the rules adopted in the former will be given from the first volume of Douglas's Election Cases, page 48. Such a comparison may serve a more meritorious purpose than that of gratifying an idle curios-

ity. It will be seen that in Parliament the committee, when formed, have the exclusive and final determination of the case, and that their decision is obligatory, both upon the parties contending, and upon the House. The following are the rules by which they are governed :

*Mode of proceeding in cases of Contested Elections in the British Parliament.*

" 7. When a petition is read, a day and hour are appointed for taking it into consideration.

" 8. The House may alter the day appointed for the consideration of any petition, and appoint a subsequent day, giving notice to the parties.

" 9. Before the statute of 10 Geo. III, an annual order was always made for proceeding first to the consideration of petitions concerning double returns. The order has not been renewed since ; however, last winter this preference was shown to the petitions from Milborne-Port and Morpeth ; the first relating to a double return, and the second complaining of a false return. They were read, and days appointed for the consideration of them, before the ballot for the others.

" 10. When the time for taking any petition, or petitions, into consideration is appointed, an order is made for the Speaker to issue his warrants for such persons, papers, and records, as shall be thought necessary by the several parties, on the hearing of the matter of such petitions.

" 11. On the day appointed for the consideration of any petition or petitions, the House cannot previously enter on any other business, except the swearing of members ; and, if there are not one hundred members present, the House must adjourn to the following day, (unless it be Sunday or Christmas day,) and so on from day to day, till the requisite number of a hundred are present.

" 12. When the hour appointed for taking any petition into consideration is come, the sergeant-at-arms is directed by the Speaker to go, with the mace, to the places adjacent, and require the attendance of the members on the business of the House.

" 13. If the number is complete, the counsel and agents for the parties attend at the bar, and the doors of the House being locked, the names of all the members, written on distinct pieces of paper, are put, in equal number, into six glasses, and the clerk draws out a name alternately from each glass, which is delivered to the Speaker, and read by him ; and so on till forty-nine names of members then present are drawn.

" 14. If the name of any member is drawn who has voted at the election complained of, or of one who is either a petitioner, or petitioned against, or whose return has not been fourteen days in the office of the clerk of the Crown, or of one not then present, his name is set aside, and does not go to make up the number of forty-nine.

" 15. If the name of any member is drawn, who will make oath that he is sixty or upwards, or verify upon oath any other excuse which the House shall approve of, or who has served upon any other committee in the course of the session, he (if he requires it) is excused, and another name drawn in his stead ; and so it is if the member's name is drawn who is intended for the nominee of either of the parties.

" The form of the oath by which any excuse is to be verified is as follows: ' The matter alleged by you, and now taken down and read, as an excuse for not serving on this committee, is the truth. So help you God.'

" 16. But the excuse of having served on a former committee during the session, cannot be allowed, if the House shall have come to a previous resolution that the number of members who have not served is insufficient to answer the purposes of the statute. And no member, who, after having been chosen to serve on a former committee, has, from inability or accident, been excused from attending it throughout, can avail himself of such excuse.

" 17. If the number of forty-nine, not set aside, nor excused, cannot be completed, the House must adjourn in the same manner as in the case where there are not a hundred present.

" 18. When there are but two distinct parties, the petitioner, or petitioners, and the sitting member, or sitting members, name each one from among the members there present, who are not of the forty-nine.

" 19. If either of the parties, or both, decline their right of nominating, the want of such nomination is supplied by drawing the name of one or two members in the same manner as the forty-nine are drawn.

" 20. The two nominees (for they are generally so called, even in the latter case, though improperly) are liable to the same objections, and entitled to the same excuses, as those drawn by lot; and in case of such objections, or excuses, others are to be nominated in their stead.

" 21. The doors of the House are then opened; two lists of the forty-nine are prepared, one of which is delivered to the counsel for the petitioners, and the other to the counsel for the sitting members; the parties, with their counsel and agents, withdraw, together with the clerk of the committee; and the parties strike off, alternately, one from the list of the forty-nine, (the petitioners beginning,) till the number is reduced to thirteen. This must be done within an hour.

" 22. Then the thirteen, together with the two nominees, take the following oath, which is administered at the table by the clerk, in the same manner as the oaths of supremacy and allegiance are: 'You, and each of you, shall well and truly try the matter of the petition of A B, referred to you, and a true judgment give, according to the evidence. So help you God.'

" 23. The House then appoints a certain time for the meeting of the committee, which must be within twenty-four hours, and is generally forthwith; and none of the fifty-one must leave the House till that time is fixed.

" 24. When there are more than two parties before the House on distinct interests, each of the parties strikes off one successively from the forty-nine, till the number is reduced to thirteen, the order of their beginning being determined by lot, after they withdraw from the bar.

" 25. In such case none of the parties appoint a nominee; but, as soon as the list of the thirteen is given into the House, they (the thirteen) withdraw, and within an hour choose two members present at the ballot, whose names have not been previously drawn; and, if they are not set aside, or excused, on the grounds already mentioned, (14, 15,) the fifteen are sworn in the manner above described, (22.)

" 26. In such case, too, none of the members present at the ballot are to depart from the House till the time for the meeting of the committee is appointed.

" 27. Both before the House of Commons and the House of Lords, and in all committees of either, one party can have but two counsel. When there is but one petitioner, or when there are two, and they unite in the same petition, they have but two counsel. And, in like manner, when the election of two sitting members is complained of on the same grounds, they have only two counsel.

" 28. In most cases there is a separate petition from certain electors, or persons claiming a right to vote, in the interest of the unsuccessful candidate. They are sometimes allowed one counsel; but they are not considered as distinct parties, so as to be entitled to strike off any names from the forty-nine.

" 29. When there are two petitioning candidates, who present distinct petitions, containing different allegations, each of them is entitled to two counsel, and the committee is formed as described, (24, 25.)

" 30. If the cases and interests of the two sitting members are distinct, each of them likewise is allowed distinct counsel, and the committee is formed in the same manner, (23, 24.)

" 31. When the committee meets at the time appointed by the House, they elect one of the thirteen who were chosen by lot, to be their chairman; and in



case of an equality of voices, the member who was first drawn has a casting vote at this election of a chairman; and there is a similar provision if, in the course of a cause, from the death or absence of the first, there should be occasion to elect a new one. This is all the business which is done that day; after which, the committee adjourns till the next, commonly at ten o'clock, and continues sitting every day from ten to about three.

" 32. They meet every day, except on Sundays and Christmas day, and cannot adjourn for more than twenty-four hours, exclusive of Sunday or Christmas day, without leave obtained from the House, on motion, and special cause assigned for a longer adjournment.

" 33. No member can absent himself without leave obtained from the House, or an excuse allowed on special cause verified upon oath. If any one does, the chairman must report it to the House, who will direct the committee to proceed without him; and he is ordered to attend, and taken into the custody of the serjeant-at-arms, and otherwise punished at the discretion of the House, unless it shall appear, by facts verified upon oath, that his absence was occasioned by sudden accident or necessity.

" 34. The committee can never sit on any day, until those members are assembled who have not been excused; and if they do not all meet within an hour of the time to which the committee adjourned, they must adjourn again; the chairman reporting the cause of such adjournment to the House.

" 35. If more than two members are absent, whether on leave, or not, the committee must adjourn from time to time, until thirteen are present.

" 36. In case the number of the members be reduced unavoidably, by death or otherwise, under thirteen, and continue so during three sitting days, *that* committee becomes *ipso facto* dissolved, and all its proceedings void; and a new committee must be chosen.

" 37. If the committee have occasion to make any application or report to the House, in relation to adjournment, absence of members, or non-attendance or misbehavior of witnesses, (*vide infra* 43,) and the House shall be then adjourned for more than three days, the committee may adjourn to the day appointed for the meeting of the House.

" 38. The committee have power to send for persons, papers, and records. They are to examine all the witnesses who come before them upon oath, and to try the merits of the return, or the election, or both.

" 39. The regular method of conducting every cause seems to be this: The petition, or petitions, being read, if the right of election be in dispute, and there is a last determination of the House, that too is read, and then the standing order of January 16, 1735-'6.

" After this, the senior counsel for the petitioners opens their case, stating what facts they mean to prove, and the points of law they mean to rely upon.

" The evidence to prove the case of the petitioners is then gone into, whether written or oral, and the following oath is administered to every witness: 'The evidence you shall give to this committee shall be the truth, the whole truth, and nothing but the truth. So help you God.'

" If the examination of a witness lasts more than one day, or if the same witness is called more than once, on different days, the oath is always administered anew every day.

" When a witness is under examination, all those who are intended to be called afterwards, on either side, are ordered to withdraw; after which, if they remain in the committee room, their evidence will not be received.

" In examining a witness, one of the counsel who calls him begins. He is then cross-examined to the same facts by the counsel on the other side, and also to any other matter which he thinks of use to the cause of his clients. Then the counsel who began the examination, re-examines him to the new matter suggested



by the other side, to which the re-examination must be confined. The members of the committee then put such questions as occur to them; or, if any new questions occur to any of the counsel of either side, as they cannot then regularly put them themselves, they suggest them to one of the members of the committee, who asks them of the witnesses.

"The evidence for the petitioners being closed, the junior counsel on that side sums it up, and draws his conclusions from it, against the sitting members, and in favor of his own clients.

"Then the senior counsel for the sitting members, after remarking upon the evidence which has been produced, and endeavoring to impeach its validity, or the conclusions drawn from it, proceeds to open the case against the petitioners, (if there are objections either to their eligibility, or to their votes.) Evidence is called to support this new case, which is gone through in the manner just described. Then the junior counsel, on the same side, sums it up, and the senior counsel for the petitioners replies to the whole.

"When there is only one petitioner and two sitting members, or one petitioner and one sitting member, the order of the proceeding is of course the same in every respect.

"40. When the counsel have closed their evidence and arguments, they are directed to withdraw; and the court being cleared, the committee settle their opinion among themselves; determining any point on which they differ by the majority of voices. If the voices are equal, the chairman has a casting vote.

"41. Though the established method seems to be that the counsel for the petitioners begin by opening the whole of their case, yet, when it happens to consist of several questions, and the determination of one would render the discussion of the others unnecessary, (as, for instance, if the objections to a sitting member are, first, that he was not eligible, and, secondly, that he had not the majority of legal votes,) the committee will then, with the consent of the parties, divide the case into the separate questions. The proceedings on each separate question are exactly in the manner which has been described, (39.) When the committee have come to a resolution upon such distinct question, the counsel being called in, it is read to them by the chairman. When the determination of the first question is sufficient for the decision of the cause, the others are not proceeded upon.

"42. If, during the course of the evidence, any objection is taken to the admissibility of any part of it, both the counsel on the side from whence the objection comes speak to it, and being answered by both the counsel on the other side, the senior replies; and then, if there appear to the committee any difficulty on the subject, the court is cleared, and the counsel, when they are called in again, receive from the chairman the directions of the committee, whether the evidence is to be admitted or rejected.

"43. If any person, summoned as a witness before the committee, prevaricate, or misbehave, in giving or refusing to give evidence, the chairman, by the direction of the committee, may, at any time during the course of the cause, report this matter to the House, for the interposition of their authority or censure.

"44. The report of the committee, containing their determination whether the petitioners, or sitting members, or either of them, are duly returned, or elected, or whether the election is void, is conclusive between the parties, and binding on the House. And it is of course ordered to be entered in the journals, and directions are given for the necessary alteration of the return, or for issuing a new writ, as the case requires.

"45. If the committee come to any resolution besides the determination just mentioned, they may, if they think proper, report it to the House at the same time that their chairman communicates such their determination. But as to such special resolution, the House is left at liberty either to disagree with, or confirm it."

That some change in the constitution of the Committee of Elections in the House of Representatives has heretofore been thought desirable, may appear from the fact that, on the 14th of June, 1813, the following resolution was offered in the House, by Mr. KING, of Massachusetts, to wit :

*“ Resolved, That the rules and orders of this House be so far altered and amended, that the Committee of Elections shall, in future, be designated by lot ; for which purpose, the names of all the members who shall take their seats on the first day of any session, on which the House may form a quorum, shall be put into a ballot box by the clerk, in presence of the House, and seven of them shall be drawn therefrom, by the Speaker, also in the presence of the House ; which seven members, thus drawn, shall constitute the Committee of Elections. And if, in any case of contested election, one or more of said committee be interested therein, or related to either of the parties, he or they shall, on motion to the House, be excused from sitting thereon, and one or more members shall be substituted in such case, by lot, as aforesaid, from all the members who shall be present, not on said committee, nor parties in said case.”*

Mr. KING also submitted, at the same time, the following resolution :

*“ Resolved, That a special committee be appointed to examine the decisions of this House already made on the subject of contested elections, and report the rules, points, and principles which appear to them to have been thereby settled or adjusted, and the cases in which they have been thus settled or adjusted.”*

It was not the fate of either of these resolutions to meet the sanction of the House ; the first was, by a vote, laid on the table ; and the other, though assigned to a subsequent day certain, appears never to have been taken up for consideration.

At a later day, the object aimed at in the second resolution was again brought to the notice of the House in this form.

On the 29th of April, 1830, Mr. BAILEY, of Massachusetts, offered the following resolution :

*“ Resolved, That the Committee of Elections be instructed to inquire into the expediency of providing for a condensed report of the principles decided by the House in the several cases of contested elections referred to said committee since the commencement of the first Congress ; together with such of the facts of the respective cases as may be necessary to the due understanding of the same.”*

The said resolution was, on motion, ordered to lie on the table.

## CASES OF CONTESTED ELECTIONS.

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### CASE I.

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#### DAVID RAMSAY vs. WILLIAM SMITH, *of South Carolina.*

[William Smith, born in the colony of South Carolina, was, while a youth, sent to Europe for his education, where he remained till the termination of the revolutionary war. In November, 1783, he returned, and, in November, 1788, was elected as one of the members to represent the State of South Carolina in the Congress to commence on the 4th of March, 1789. His seat being contested on the ground that he had not been "seven years a citizen of the United States," it was *held*, after debate, that he was entitled to the seat.]

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#### COMMITTEE OF ELECTIONS.

Mr. CLYMER,  
AMES,  
BRISON,  
CARROLL,

Mr. WHITE,  
HUNTINGTON,  
GILMAN.

On the 15th day of April, 1789, Mr. Ramsay exhibited to the House his petition, setting forth that William Smith was ineligible as a member thereof, by reason of his not having been, when elected, seven years a citizen of the United States, agreeably to the requirement of the constitution. It was

*Ordered*, That the petition be referred to the Committee of Elections, with instructions to prepare a proper mode of investigation and decision thereon. On the 18th of April, the said committee reported as follows:

"That it will be sufficient, in the first instance, that a committee take such proofs as can be obtained in this city, respecting the facts stated in the petition, and report the same to the House. That Mr. Smith be permitted to be present, from time to time, when such proofs are taken, to examine the witnesses, and to offer counter proofs, which shall also be received by the committee, and reported to the House. That if the proofs, so to be reported, shall be declared by the House insufficient to verify the material facts stated in the petition, or such facts as the House shall deem proper to be inquired into, it will then be necessary for the House to direct a further inquiry, and especially the procuring whatever additional testimony may be supposed to

Report  
of committee.

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1st CONGRESS,  
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be in South Carolina, as the case may require: that all questions arising on the proofs be decided by the House, without any previous opinion thereon, reported by a committee."

And it was thereupon, in the words following,

*Resolved*, That this House doth agree to the said report, and that it be an instruction to the *Committee of Elections* to proceed accordingly."

On the 12th day of May, the same committee made the following additional report:

"That Mr. SMITH appeared before them, and admitted that he had subscribed, and had caused to be printed in the *Gazette of South Carolina*, of the 24th of November last, the publication which accompanies this report, and to which the petitioner doth refer, as proof of the facts stated in his petition. That Mr. Smith also admitted that his father departed this life in the year 1770, about five months after he sent him to Great Britain; that his mother departed this life about the year 1760; and that he was admitted to the bar of the Supreme Court, in South Carolina, in the month of January, 1784."

The committee also reported sundry counter proofs produced by Mr. Smith, consisting of the printed copies of sundry laws of South Carolina, the titles of which only are given in the report. [See Journal of the House, vol. I, p. 33. Reprint.]

*Ordered*, That the said report do lie on the table.

MAY 21, 1789.

The House proceeded to consider the petition of Dr. Ramsay, and to examine the evidence and vouchers produced by both parties, and having made some progress therein, adjourned.

MAY 22.

Mr. LAWRENCE moved to recommit the matter to the committee, with instructions to examine and report the facts arising from the proofs, that the House might not be put to the trouble of ascertaining those facts from voluminous documents, the reading of which would require much time.

Remarks of  
Mr. Livermore.

Mr. LIVERMORE objected to the motion. He wished to draw the attention of the House to the precise mode in which he thought this matter ought to be conducted. In his opinion the proper mode of proceeding was, first, to hear the allegations of the petitioner, or prosecutor, and to examine the evidence by which these allegations were supported; and, in the second place, to hear the evidence and defence of the respondent. When this was done, a judgment might be formed of the merits of the case. This was the course in courts of justice: an absolute judge should not

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found his opinion upon any particular foreign statement of facts, but upon the whole view of the cause. If this was proper for a single judge, much more was it for a great number of judges, who were absolute in their decision. It might happen, he said, in this, as in other cases, that one part of the evidence might strike one of the judges in a particular way, and another part might appear differently to the court. In the case of a jury, he observed, the decision was divided, and the judge formed his determination from the facts ascertained by the jury. But this did not compare with the situation and office of this House, who were absolute and independent. He thought that, upon these principles, it was improper to refer the subject to a committee. The proofs might appear to a committee in a different light from that in which they would strike the majority of the House. Besides, it would be improper to load the journals with a long series of facts which the committee might report. He contended that the House, in its original capacity, was the only body by whom the proofs of the parties could properly be examined.

Mr. BOUDINOT was in favor of the motion. He thought all the facts on which the decision of the House was to be formed, ought to be stated with the utmost precision, and be clearly established. Particular caution, he said, was necessary, when it was considered that the present business might be a precedent for all future cases. Unless the committee should state the facts, it was impossible for the House to obtain a knowledge of the case. Suppose there should be witnesses introduced, would it be proper for the House to attend to all the minute circumstances of their evidence? It happened in this case that the evidence was all contained in writing, but the mode now adopted would establish a precedent; and, in future, the House might be embarrassed with a great body of oral testimony.

Remarks of  
Mr. Boudinot.

Mr. THATCHER opposed the motion. He thought the House had no right, and, if they had, it would be very improper to delegate to any number of men a power of judging for them. The constitution had provided that each House should be the judge of its own elections, evidently intending that it should be in their own original capacity. If the House should take the facts as reported by the committee, they would found their judgment upon the credit or judgment of the committee. If it could be delegated to a committee to examine the proofs, the whole might as well be delegated to them; the House would cease to be triers of the election. They would put the power out of their own hands, and upon what principle and reasons they founded their judgments, they would be incapable of determining.

Remarks of  
Mr. Thatcher.

After some further debate, the question was put, and negatived.

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Statement of  
facts admitted  
by sitting mem-  
ber.

The House then went into an examination of the evidence in behalf of Mr. Smith, the facts alleged by Dr. Ramsay being admitted, as follows, to wit:

"That Mr. Smith was born in South Carolina, of parents whose ancestors were the first settlers of the colony, and was sent to England for his education when about twelve years of age. In 1774, he was sent to Geneva to pursue his studies, where he resided until 1778. In the beginning of that year he went to Paris, and resided two months as an American gentleman; was received in that character by Dr. Franklin, Mr. Adams, and Mr. Arthur Lee, the American commissioners to the Court of France. In January, 1779, he left Paris for London, to procure from the guardian appointed by his father the means of his return to America. He was disappointed, however, of the expected aid, and was obliged to remain in England till he could get remittances from Charleston. In the interval, the State of South Carolina fell into the hands of the enemy, and this rendered it impossible at that time to return. He remained in England, and embraced the opportunity to acquire a knowledge of the English law, but could not be admitted to the practice of it, because he had not taken the oath of allegiance to Great Britain, which is a necessary qualification. Having obtained the necessary funds, he left London in October or November, 1782, with a view of returning to America, but avoided taking passage for Charleston, because it was then in the possession of the British, but travelled over to Ostend, and there embarked in a neutral vessel for St. Kitts, with the intention of seizing the first opportunity of reaching the American camp. In January he sailed from Ostend, but was shipwrecked on the coast of England, and obliged to return to London, in order to procure another passage, and was thus prevented from reaching the United States till 1783.

"That, on his arrival at Charleston, he was received by his countrymen as a citizen of the State of South Carolina, and elected by their free suffrages a member of the Legislature; and was, subsequently, elected to several honorable posts, and, finally, in 1788, to the seat in Congress, which is the subject of this contest."

After having stated these facts, he went on adverting to the laws referred to in the report of the committee, which, he said, he conceived to be applicable to the present case.

In September, 1779, a question was discussed in the Legislature of South Carolina, respecting the young men who were sent abroad for their education, and it was determined that it was most for the interest of the State that they should be allowed to continue in Europe till they were twenty-two years of age; after which, the law provided they should be doubly taxed if they did not return. This law might fairly be supposed to recognise the citizenship of all the young men



in a similar predicament with himself. It allowed them all to be absent until they were twenty-two years of age ; but, even after that period, it did not deprive them of the right of citizenship ; it only subjected them to the penalty of a double tax. This he contended was a sort of compact with him, that, if he chose to be absent after that time, he should suffer a certain penalty, which, in its own nature, implied that his citizenship remained ; but, before he attained that age, South Carolina was in such a situation that her best friends were compelled to be absent, and take refuge in distant countries. It was not till some time after that the friends of the American cause began to assemble in that State ; the absentee law, therefore, never operated on him, and he never was doubly taxed.

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In February, 1782, the Legislature met at Jacksonburg, and discriminated between friend and foe, between American and British subjects, by disposing of the estates of the latter, and banishing them. From an inspection of the law passed at that time, it would be evident in what light they viewed him. He had landed property in the State, but was himself in England ; yet they did not attempt to confiscate his property, or subject him to an amercement. The absentee law was his safeguard ; he had the permission of the State to be abroad.

Statement of  
evidence.

If the Legislature, in 1782, recognised as citizens some of those persons whose estates were confiscated for adhering to Great Britain, and for being disaffected to America *a fortiori*, did it not recognise as a citizen one whose estate was not forfeited, who had not been deemed worthy of punishment, and who had been absent under the sanction of the law ?

By the constitution of South Carolina, it appears that no person was eligible to a seat in the Legislature until he had resided three years, nor to a seat in the Privy Council until he had resided five years in the State. He had a seat in both those bodies before he had resided two years in the State of South Carolina, and no objection was ever made on that score. He could not have been qualified for either, had not the people of South Carolina deemed his residence in that State such a residence as gained him a qualification ; or had they not supposed the qualification required in the constitution applied only to new comers and new citizens, for whom that residence was necessary to wean them from their local prejudices and national habits, and to attach them to the commonwealth. Had they not, in short, supposed him to have been a citizen during the revolution, and attached to his native State by every tie which could bind an individual to any country. Three years' residence was either not required of him, or his former residence was deemed within the meaning of the constitution.

Of the resi-  
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Carolina.

An act to confer the right of citizenship on aliens was passed March 26, 1784. For the purpose of possessing the

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subordinate right: the alien duty, a of allegiance, was elections, a perso years prior to his citizen, being cl Legislature and naturalized by l elected into the l jection, in Januar Council October, law.

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Remarks of  
Mr. Lee.

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Remarks of  
Mr. Thatcher.

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subordinate rights of citizenship, such as an exemption from the alien duty, a residence of one year, and taking the oath of allegiance, was sufficient. To confer a right of voting at elections, a person must have been admitted a citizen two years prior to his voting; but for the higher privileges of a citizen, being eligible to offices of trust, to a seat in the Legislature and Privy Council, the alien must have been naturalized by law. Now, in November, 1784, he was elected into the Legislature, and took his seat without objection, in January, 1785, and was elected into the Privy Council October, 1785; all without being naturalized by law.

Further state-  
ment of facts.

In October, 1785, when he was elected to the Council, his election was opposed, but the objection now brought forward was not then made; and the memorialist himself, who was a member of the Legislature, voted in favor of the choice; though, unquestionably, unless he was considered by the Legislature as a citizen before he returned to Charleston, nothing had afterwards occurred to make him so, and the alien act of 1784 positively required a naturalization by act of Assembly, to give him a qualification.

The constitution of South Carolina is silent as to citizenship, but allowed any person to vote at elections who had resided a year in the State, and paid a certain tax; to be a member of the Assembly, he must have resided three, and to be a Privy Councillor, five years previous to his election; but nothing was said about citizenship. The act of 1784, however, expressly defined who should, and who should not, be deemed citizens; and, consequently, all persons who did not become citizens, must have been held to be aliens, and considered so till they had conformed to the alien act of 1784. Now, as he was admitted to offices of trust, to which aliens were not admissible, and as he was admitted to them without having the rights of citizenship conferred upon him, in pursuance of that act, it followed clearly that the people of South Carolina and the Legislature acknowledged him to be a citizen by virtue of the revolution.

Defence by  
Mr. Smith.

He went on to observe, that, from the doctrine laid down by the memorialist, it was difficult to ascertain when he did become a citizen of South Carolina. When he was admitted to the bar in 1784, he did no act which made him a citizen; the bare act of taking an oath of qualification to an office, could not convert an alien to a citizen. The constitution seemed to imply that a mere residence of a year, by giving a right to vote, gave a right of citizenship; if that were the case, and if his residence, prior to the revolution, was considered such a residence as the constitution required, then he was a citizen, by virtue of the constitution, after having resided a year in Carolina. Now, it was clear his residence, prior to the war, was deemed such a residence as the constitution required; because he was admitted to vote, and

admitted to a seat in the Legislature and Council, by right of such residence, not having had the requisite residence since the war, and yet being deemed qualified. If, therefore, that part of the constitution which gave a right of voting, in consequence of a year's residence, and paying a certain tax, virtually conferred citizenship, by giving a right to vote, (and it appeared absurd that a right to vote should be given to persons not citizens,) and if, also, his residence, prior to the revolution, was deemed a sufficient residence, then he was a citizen by virtue of the constitution.

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The points that seemed most to be relied upon by the memorialist, were :

1st. That residence was actually necessary to confer citizenship, or, in other words, that a person could not become a citizen of a country till he has resided in it.

Speech of Mr.  
Smith.

2d. That a person could not become a citizen till he was of age to choose his country.

In answer to the first, he denied that residence in the country was absolutely necessary. Was it to be supposed, he asked, that when a man sent his son into another country for his education and improvement, the son was thereby to lose any political benefits which might, during such temporary absence, accrue to his country? If his father had lived a few years longer, would there have arisen any question on this subject? Would he not, though absent, have acquired, according to the petitioner's own positions, a right of citizenship? And should his death, at such an early period, not be deemed a sufficient misfortune for him, without using that as a pretence for making him an alien? Those who represented him in Carolina as his guardians, who were *in loco parentis*, were residents in Carolina at the declaration of independence.

His property was in Carolina, his money in the Treasury, assisting to carry on the war. The declaration of independence affected him as much, though at Geneva, as it did those in Carolina; his happiness, that of his dearest connexions, his property, were deeply interested in it: his fate was so closely connected with that of Carolina, that any revolution in Carolina was a revolution to him. Though a minor, as soon as he heard of the independence of America, he considered himself an American citizen.

If a person could not become a citizen of a country, without residing in it, what should be said of those gentlemen who had been in Europe during the war, and were now in high office in America? Several of them went to Europe before the war, were there at the declaration of independence, and did not return to America till after the war, or about the close of it. When did their citizenship commence? According to the petitioner, they could not become citizens of America until they returned to America, and took an oath of allegiance to the States; but Congress employed them in

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offices of great confidence, before they had returned to America, or taken such oath. Congress, therefore, considered them citizens, by virtue of the revolution.

It had been said that Carolina had called on her young men to come to her assistance. This was not the true state of the case. Carolina thought that her young men who were abroad for their education should not be taken from their studies till they were twenty-two years of age, and doubly taxed them after that. His guardian wrote to him that he had permission of the Legislature to be absent till he was twenty-two, and that he should be doubly taxed after that age.

Speech of Mr.  
Smith contin-  
ued.

It has been also said that Carolina tendered an oath, to discover who were friends, and who were enemies. In March, 1778, the Legislature of South Carolina passed an act to oblige every free male inhabitant of that State, above sixteen years of age, to take an oath of allegiance to the State. As there were notoriously many persons then in the State who were inimical to its liberties, such a step was necessary to give a reasonable cause for obliging them to quit the country. With that view, the oath was generally tendered only to those who were suspected or known not to be friendly to the cause. He had been informed by several persons, who were zealous partisans, and then in Carolina, that they had never taken any oath of allegiance, and that it had not been required of them on this occasion.

The act directed that those who did not take it should quit the State; and, if they returned, should be dealt with as traitors, and suffer death. Let us examine whether this act can, in any respect, apply to the present question. 1st. It particularly mentioned "inhabitants of the State of South Carolina." It could not, therefore, apply to persons who were abroad. 2d. It directed that the oath should be taken before a justice of peace in Carolina; this could not, therefore, extend to a person then at Geneva. 3d. It was directed to be taken in one month after the passing of the act; and it was not possible that I should hear of the existence of such an act in less than three months. 4th. It was directed that if the persons refused to take it, they should quit the State; but I was already out of it. 5th. Those who refused to take it, were prevented from acquiring or conveying property, and rendered incapable of exercising any profession. But, on my return to Carolina, I took peaceable possession of my estate, part of which consisted of lands and houses, which had been mine since the year 1770; and I was immediately admitted to the exercise of the profession for which I was educated. 6th. The act directed that if any person returned to Carolina, after having refused to take the oath, he should be put to death as a traitor; and yet, on my return, never having taken the oath, I was elected a member of the Legislature, and a Privy Councillor; and, instead

of being deemed a criminal myself, I acted as Attorney General to punish others; and yet the petitioner, in one of his late publications, lays great stress on the applicability of this act.

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2dly. There could be no doubt that a minor might be a citizen, from the very words of the constitution, which admitted a person to be a member of the House of Representatives at twenty-five, and yet required a citizenship of seven years. This was of itself a sufficient refutation of every thing contained in the petition on this head. The constitution acknowledged that a person might be a citizen at eighteen; if so, there was no reason why a person might not be one at sixteen or fourteen.

Mr. LEE said the committee had now to determine whether Mr. Smith was a citizen of South Carolina during his absence from home, or not. If the laws of that State recognised him as such, the question was determined, because this House could not dispute a fact of that kind. From the reference that has been made to the constitution and laws of South Carolina, and the circumstances which took place under them, with respect to Mr. Smith, it was convincing that he was acknowledged there to be a citizen in consequence of the revolution.

Remarks of  
Mr. Lee.

Mr. THATCHER thought the examination had been full; the facts stated in the memorial were admitted; but, nevertheless, it appeared, from other facts, that Mr. Smith was received, and respected as a citizen of that standing which the constitution required. He had considered the subject maturely, and was now ready for the decision.

Remarks of  
Mr. Thatcher.

The petition of Dr. Ramsay was again read, in which he stated "that citizenship with the United States is an adventitious character to every person possessing it, who is now thirty years of age; and that it can, in no case, have been acquired but in one of the following modes: 1st. By birth or inheritance. 2d. By having been a party to the late revolution. 3d. By taking an oath of fidelity to some of the States. 4th. By tacit consent. 5th. By adoption: and that Mr. Smith cannot have acquired the character of a citizen, in either of these modes, seven years ago. He cannot be a citizen by birth or inheritance, for he was born in 1758, in South Carolina, while a British colony; and his parents were both dead many years before the declaration of independence; his birthright and inheritance can, therefore, be no other than that of a British subject; for no man can be born a citizen of a Government which did not exist at the time of his being born; nor can parents leave to their children any other political character than that which they themselves possessed."

Dr. Ramsay's  
petition.

After going on to state his reasons why Mr. Smith could not have acquired citizenship in any of the other modes, he proceeds to say that he "conceives that birth and residence

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in this country, before the revolution, could not confer citizenship on Americans who were absent when independence was declared while they were absent, and anterior to their returning and joining their country under its new and independent Government: for, on that supposition, many persons hostile to these States must be admitted citizens; those who have been born for thirteen years before the declaration of independence, within the posts of our northwestern frontiers, which are unjustly detained from us by the British, would be citizens. Our East India trade would be laid open to the numerous natives of this country, who are now dispersed over Europe and the West Indies. If birth and residence within the limits of the United States, before the revolution, conferred the rights of citizenship, persons of the aforesaid description, who have neither done nor hazarded any thing for our independence, might trade to the East Indies as citizens of the United States, from the circumstance of their having been born in this country thirty or forty years ago, and, after having glutted our market with extravagant importations, carry the whole profits of their commerce to their present residence in foreign countries. These, and many other dangerous consequences, would, as your petitioner apprehends, follow from the establishment of a precedent, by which it was acknowledged that a native of this country might be a citizen of the United States before he lived under their Government."

Remarks of  
Mr. Madison.

Mr. MADISON. I think the merit of the question is now to be decided, whether the gentleman is eligible to a seat in this House or not; but it will depend on the decision of a previous question, whether he has been seven years a citizen of the United States or not.

From an attention to the facts which have been adduced, and from a consideration of the principles established by the revolution, the conclusion I have drawn is, that Mr. Smith was, on the declaration of independence, a citizen of the United States; and unless it appears that he has forfeited his right by some neglect or overt act, he had continued a citizen until the day of his election to a seat in this House. I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us; and where the laws do not expressly guide us, we must be guided by principles of a general nature, so far as they are applicable to the present case.

It were to be wished that we had some law adduced, more precisely defining the qualities of a citizen or an alien; particular laws of this kind have obtained in some of the States; if such a law existed in South Carolina, it might have prevented this question from ever coming before us; but since this has not been the case, let us settle some general principle before we proceed to the presumptive



proof arising from public measures under the law, which tend to give support to the inference drawn from such principles.

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It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States; it will, therefore, be unnecessary to investigate any other. Mr. Smith founds his claim upon his birthright; his ancestors were among the first settlers of that colony.

It is well known to many gentlemen on this floor, as well as to the public, that the petitioner is a man of talents, one who would not lightly hazard his reputation in support of visionary principles: yet I cannot but think he has erred in one of the principles upon which he grounds his charge. He supposes, when this country separated from Great Britain, the tie of allegiance subsisted between the inhabitants of America and the King of that nation, unless, by some adventitious circumstance, the allegiance was transferred to one of the United States. I think there is a distinction which will invalidate his doctrine in this particular; a distinction between that primary allegiance which we owe to that particular society of which we are members, and the secondary allegiance we owe to the sovereign established by that society. This distinction will be illustrated by the doctrine established by the laws of Great Britain, which were the laws of this country before the revolution. The sovereign cannot make a citizen by any act of his own; he can confer denizenship; but this does not make a man either a citizen or subject. In order to make a citizen or subject, it is established that allegiance shall first be due to the whole nation; it is necessary that a national act should pass to admit an individual member. In order to become a member of the British empire, where birth has not endowed the person with that privilege, he must be naturalized by an act of Parliament.

Speech of Mr.  
Madison con-  
tinued.

How citizen-  
ship is acquir-  
ed.

What was the situation of the people of America, when the dissolution of their allegiance took place by the declaration of independence? I conceive that every person who owed this primary allegiance to the particular community in which he was born, retained his right of birth as a member of a new community; that he was consequently absolved from the secondary allegiance he had owed to the British sovereign. If he were not a minor, he became bound, by his own act, as a member of the society who separated with him from a submission to a foreign country. If he were a minor, his consent was involved in the decision of that society to which he belonged by the ties of nature. What was the allegiance, as a citizen of South Carolina, he owed to the King of Great Britain? He owed his allegiance to him as a King of that society to which as a society he owed

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his primary allegiance. When that society separated from Great Britain, he was bound by that act, and his allegiance transferred to that society, or the sovereign which that society should set up; because it was through his membership of the society of South Carolina that he owed allegiance to Great Britain.

Speech of Mr.  
Madison.

This reasoning will hold good, unless it is supposed that the separation which took place between these States and Great Britain not only dissolved the union between those countries, but dissolved the union among the citizens themselves: that the original compact, which made them altogether one society, being dissolved, they could not fall into pieces, each part making an independent society, but must individually revert into a state of nature; but I do not conceive that this was, of necessity, to be the case; I believe such a revolution did not absolutely take place. But in supposing that this was the case, lies the error of the memorialist. I conceive the colonies remained as a political society, detached from their former connexion with another society, without dissolving into a state of nature, but capable of substituting a new form of Government in the place of the old one, which they had, for special considerations, abolished. Suppose the State of South Carolina should think proper to revise her constitution, abolish that which now exists, and establish another form of Government: surely this would not dissolve the social compact. It would not throw them back into a state of nature. It would not dissolve the union between the individual members of that society. It would leave them in perfect society, changing only the mode of action, which they are always at liberty to arrange. Mr. Smith being, then, at the declaration of independence, a minor, but being a member of that particular society, he became, in my opinion, bound by the decision of the society, with respect to the question of independence and change of Government; and if afterwards he had taken part with the enemies of his country, he would have been guilty of treason against that Government to which he owed allegiance, and would have been liable to be prosecuted as a traitor.

Of the effect of  
the revolution  
upon the alle-  
giance due by  
the subject.

If it be said that very inconvenient circumstances would result from this principle, that it would constitute all those persons who are natives of America, but who took part against the revolution, citizens of the United States, I would beg leave to observe that we are deciding a question of right, unmixed with the question of expediency, and must, therefore, pay a proper attention to this principle. But I think it can hardly be expected by gentlemen that the principle will operate dangerously. Those who left their country to take part with Britain, were of two descriptions—minors or persons of mature age. With respect to the latter, nothing can be inferred, with respect to them, from the decision of the present case; because they had the power of



making an option between the contending parties ; whether this was a matter of right or not, is a question which need not be agitated in order to settle the case before us. Then, with respect to those natives who were minors at the revolution, and whose case is analogous to Mr. Smith's, if we are bound by the precedent of such a decision as we are about to make, and it is declared that they owe a primary allegiance to this country, I still think we are not likely to be inundated with such characters ; so far as any of them took part against us, they violated their allegiance, and opposed our laws ; so, then, there can be only a few characters, such as were minors at the revolution, and who have never violated their allegiance by a foreign connexion, who can be affected by the decision of the present question. The number, I admit, is large, who might be acknowledged citizens on my principles : but there will very few be found daring enough to face the laws of the country they have violated, and against which they have committed high-treason.

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Mr. Madison.

So far as we can judge by the laws of Carolina, and the practice and decision of that State, the principles I have adduced are supported ; and I must own that I feel myself at liberty to decide that Mr. Smith was a citizen at the declaration of independence, a citizen at the time of his election, and, consequently, entitled to a seat in this Legislature.

Mr. Boudinot expressed an apprehension that the principle supported by the gentleman from Virginia would tend to injure the State of New Jersey very considerably. He was afraid it would be construed to embrace all the natives of America who had deserted their country's cause during the late war ; and, on this account, he was against deciding in favor of the proposed resolution, though he believed Mr. Smith to be fairly and constitutionally entitled to a seat in that House.

Remarks of  
Mr. Boudinot.

Mr. JACKSON. I differ widely from the gentleman from Virginia (Mr. MADISON) on the subject of allegiance and the social compact, and hold the principles advanced by him exceedingly dangerous to many of the States, and, in particular, to the one I have the honor to represent. The situation of America, at the time of the revolution, was not properly to be compared to a people altering their mode or form of Government. Nor were there two allegiances due, one to the community here, another to that of Great Britain. We were all on a footing ; and I contend the principle is right, in some degree, of a total reversion to a state of nature amongst individuals, and to a mere parental or patriarchal authority, where the heads had families dependent on them ; the former, or individual, pursued that line which appeared right in his own eyes, and the cause which he thought just ; and, in the latter case, the children follow-

Remarks of  
Mr. Jackson.

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reply to Mr.  
Madison.

ed the will of the father, who chose for them, as the person who brought them into life, and whose fortunes they were to inherit. I conceive the whole allegiance or compact to have been dissolved. Many of the States were a considerable period without establishing constitutions or forms of Government, and during that period we were in a little better state than that of nature; and then it was that every man made his election for an original compact or tie, which, by his own act, or that of his father for him, he became bound to submit to. And what, sir, would otherwise be the result? And if the gentleman's doctrines of birth were to be supported, those minors who, with British bayonets, have plundered and ravaged, nay, cruelly butchered their more virtuous neighbors—the sons of the most inveterate traitors, whose names deservedly sounded in every bill of confiscation; and the minors, sons of those who sheltered themselves under the shade of the British King, and supported his armies, if not with arms, with the resources of war, until the hour of danger was over—those, I say, after the blood of thousands has been spilt in the establishment of our Government, can now come forward and sneer at the foolish patriots who endured every hardship of a seven years' war, to secure to them the freedom and property they had no hand in defending. Sir, did we fight for this? Was it for this the soldier watched his numerous nights, and braved the inclemency of the seasons? Will he submit, after having gained his point at the expense of property, and the loss of constitution, to have those sentiments established? If he will, he has fought to little purpose indeed.

Sir, I again contend that when the revolution came on, we were all alike with respect to allegiances, and all under the same social tie. An Englishman born did not conceive himself more liable to be condemned for treason than an American, had the enemy succeeded; nor would there have been any distinction in the laws on coming to a trial. But, sir, how should this primary allegiance be known to belong to the less, or American community, where the majority did not prevail? In Georgia the majority were opposed to American measures. Agreeably to the gentleman's reasoning, the minors must have been all on the British side; and yet many of them, on arriving to years of discretion, behaved well and valiantly with us. To corroborate this, sir, I will remark, that, for a considerable period, we had no general or federal Government, or form of constitution; and yet were in arms. I would ask what state we were in then. Neighbor was against neighbor, and brother against brother. But, sir, the gentleman says the hardened minor will not return. Sir, experience has proved the contrary. The Middle and Eastern States, except Pennsylvania, New Jersey, and New York, never had the enemy long with them; there was not the same trial of men; and they knew not the

audacity of those villains. After having received their equivalent for, in many cases, feigned losses, from the British Crown, they are daily returning and pushing into office. It is necessary we should guard against them. Britain, although humiliated, yet has a longing eye upon this country; she has yet posts in it. Although it is improbable that so many of these people will get into Congress as to form a corrupt majority, yet they have ambition and resentment enough to attempt it. At this moment, sir, in Georgia, are some of the most daring bringing ejectments for estates which their fathers had deservedly forfeited, although themselves had imbrued their hands in the blood of their fellow-citizens.

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Now, to the present case. Highly as I regard the gentleman (Mr. Smith) as a valuable member, and esteem his abilities, I can only form my opinion on the leave given him by the State to be absent. If that principle is introduced into the resolution, I will vote in favor of Mr. Smith's eligibility; but if not, I must decline voting.

Which he accordingly did, when the question was put upon the following resolution, to wit:

*Resolved*, That it appears to this House, upon mature consideration, that WILLIAM SMITH had been seven years a citizen of the United States at the time of his election.

Mr. TUCKER hoped that the yeas and nays would be taken on this question, not because he had any doubt in his own mind of Mr. Smith's right to a seat, but because he had been solicited by Dr. Ramsay to have the yeas and nays taken.

Remarks of  
Mr. Tucker.

The yeas and nays were taken as follows:

YEAS.—Messrs. Baldwin, Benson, Boudinot, Cadwalader, Carroll, Clymer, Coles, Contee, Fitzsimons, Floyd, Gilman, Goodhue, Heister, Huntington, Lawrence, Lee, Leonard, Livermore, Madison, Moore, Muhlenberg, Page, Van Rensselaer, Seney, Schureman, Scott, Sinnickson, Smith, of Maryland, Sturgis, Sylvester, Thatcher, Trumbull, Tucker, Vining, White, and Wynkoop.

Jonathan Grout voted in the negative.

So that Mr. SMITH was confirmed in his seat.

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## CASE II.

## THE NEW JERSEY MEMBERS.

[The election of the delegation from this State appears to have been contested on the ground of some alleged informality or corruption, but of what precise nature cannot be learnt from any accessible sources, as the facts were not reported by the committee, and do not appear in the journals of the House.]

*Debate as to the mode of taking testimony in cases of Contested Elections.*

Petitions from sundry citizens of the State of New Jersey, complaining of illegality in the election of the members from that State, were referred to the Committee of Elections. On the 15th May other petitions in favor of the validity of the election were also referred.

On the 21st May the said committee made a report as to the mode of taking testimony in the said case, as follows, to wit:

Report of the  
Committee of  
Elections.

“That it will be proper to appoint a committee, before whom the petitioners are to appear, and who shall receive such proofs and allegations as the petitioners shall judge proper to offer in support of their said petition; and who shall, in like manner, receive all proofs and allegations from persons who may be desirous to appear and be heard in opposition to said petition; and to report to the House all such facts as shall arise from the proofs and allegations of the respective parties.” And it was

“Resolved, That this House doth agree with the committee in the said report, and that it be an instruction to the Committee of Elections to proceed accordingly.”

[It may be proper here to remark that the original papers and documents of Congress, from the first to the sixth Congress, or a great portion of them, were destroyed with the Capitol in 1814, and, among other important papers, those relating to contested elections were consumed. The accuracy which might be otherwise attainable in regard to cases of that period, is therefore not to be expected. From Lloyd's Debates, vol. 2, p. 76, it appears that on the 14th of July, Mr. Ames, from the Committee of Elections, made a report in this case, which was read, and ordered to lie on the table. The report itself is not to be found published, nor is there any record of it among the proceedings of the House. We learn, however, from Lloyd, that “this report stated that certain allegations in the petition required the testimony of

some witnesses which the committee did not think themselves authorized to collect; they therefore requested the direction of the House in the manner of proceeding with respect to such testimony; also, with respect to the request of the petitioners in favor of the sitting members, that they might be heard by counsel."

1799.  
1st Congress,  
1st Session.

Upon this report there resulted a debate, of which the following outline is given.]

Mr. Boudinot observed that he could answer for himself, and, he believed, for the other Jersey members, that the suffrages of their constituents had not been solicited by them, nor had they been any ways concerned in any of the transactions at the election complained of. In consequence of the commissions received from the Governor and Council of New Jersey, who had declared the election legal, he and his colleagues appeared in the House. The Governor's conduct had been censured upon the occasion; however, their proceedings have been published and laid before the House, and the petitioners have agreed that they shall be admitted as evidence in this case. He thought it unnecessary that the petitioners in favor of the election should be heard by counsel. He said the sentiments of the other sitting members coincided with his; they gave up every advantage that might arise from this, rather than occasion the great delay that must attend it.

Remarks of  
Mr. Boudinot.

The committee, he said, have applied to the House for power to send a commission into New Jersey to take testimony in contradiction to what has been certified by the Executive Magistrate. Now, I submit to the House whether this certificate, admitted to be true on all hands, is not the best evidence the nature of the case admits, and whether it will be necessary to send through that State a commission to examine every person who chooses to offer evidence on the subject. I think such a measure will produce great evils, as a precedent, and many others, in its operation. In the first place, such evidence will be taken *ex parte*, because it will be next to impossible for the opposite party to attend in order to cross-examine the witnesses. It will put the petitioners to great expense and inconvenience, and, after all, the uncertainty will be as great as at this moment.

But the precedent, I conceive, will be extremely dangerous; if a contested election should take place in New Hampshire, or Georgia, we shall be obliged to send a commission into those States for the purpose of obtaining testimony, which, after all, can never be so satisfactory as *via voce* evidence; and more time may be spent in executing this commission, where the judges have to travel from district to district, through a State of five or six hundred miles extent, and examine every judge, inspector, and elector, than the representation is chosen to sit.

We thought it proper to lay these reasons before the House,

1859.  
1st Congress,  
1st Session.

and then leave the matter to their decision, to which we shall submit with cheerfulness. We came here with an ardent desire to carry the constitution into effect. Actuated by this motive, we mention to the House the great attention which ought to be paid to secure the freedom of election, upon which alone the whole fabric depends. It is not that we dread the fullest investigation, that we submit these sentiments; it is our anxious wish to have the question of our election speedily determined, and not delayed by what we conceive a useless measure.

Remarks of  
Mr. Ames.

The question before the House appears to be, whether it is necessary to obtain a few additional witnesses, at great uncertainty and expense, or whether the evidence already before them, and what may further be advanced by the petitioners *viva voce*, is not sufficient to decide upon.

Mr. AMES brought forward several resolutions, which he thought would bring the question alluded to by the honorable gentleman from New Jersey, fairly before them; the first prescribed the mode of taking depositions by commission.

Remarks of  
Mr. Benson.

This being read, together with the papers containing the charges, and the certificate of the Governor,

Mr. BENSON observed that the House had referred this business to the Committee of Elections, to report facts arising from the proofs; that it appeared to the committee that certain facts respecting the manner in which the election was conducted, might be material, but the testimony could not be procured by them without the aid of the House; they had, therefore, made a report of this nature. He thought the House had better consider whether the facts alluded to by the committee were material or not; if they were not material, the House could not adopt the resolutions proposed by Mr. AMES; but if they were, then those resolutions will come properly before them.

Remarks of  
Mr. Vining.

Mr. VINING opposed Mr. AMES's proposition for empowering the judges of New Jersey to take this evidence; he was in favor of receiving the testimony *viva voce* before the House; the vicinity of that State would render this mode not inconvenient, and if it should be found necessary to form commissions for this purpose in distant States, provision might be made accordingly.

Remarks of  
Mr. Lawrence.

Mr. LAWRENCE remarked that it had been questioned how far the House had a right to interfere in the election of particular States, but that Congress has received a discretionary power from the constitution to regulate the time, manner, and place of holding elections; and it is stated in another clause that the election and qualification of its own members shall be judged by the House; by this means, all transactions relative to such elections are included; consequently, they may determine in what manner the investigation of such a subject shall be prosecuted, if any doubts



arise on that point, the sense of the House must be taken thereon.

1789.  
1st Congress,  
1st Session.

Mr. BENSON proposed a day to be assigned, on which the parties should have a hearing before the House on the question, either by themselves or by counsel, whether by the constitution an inquiry can take place before the House relative to the fact alleged.

Remarks of  
Mr. Benson.

Mr. WHITE objected to counsel being introduced in the present instance; he judged the House as competent to decide this business, as they had already been to determine many other constitutional questions.

Remarks of  
Mr. White.

Mr. JACKSON was of opinion that no such question could be admitted with propriety; one election had been determined without the aid of counsel, or *ex parte* evidence; and he saw no reason, in the present case, why a different mode should be substituted. The authority of this House is not to be called in question by an individual; there can be no doubt of its jurisdiction in the case. One gentleman has been tried by the House, upon the evidence that was brought before us. It will not be pretended that the delicacy and feelings of that gentleman could be less than those of the gentlemen concerned in the present question. It would be inconsistent, and unjust to subject one member to a particular mode of trial, and then deliberate whether that same mode shall be adopted with respect to another.

Remarks of  
Mr. Jackson.

Mr. SENEY said he did not doubt the jurisdiction of the House; but as some objection had been made by the petitioners, and they had prayed to have the point settled, he thought they ought to be indulged; that every citizen had a right to be heard in his own defence, where he considered his right concerned.

Remarks of  
Mr. Seney.

It was then moved that the report of the committee should lie on the table, in order to take up the proposition of Mr. BENSON.

Mr. AMES objected to this proposition, as the greatest inconveniences might arise from it; it would discourage a number of people from applying for justice, especially those who lived remote from the seat of Government, provided they were obliged to attend in person, and give their testimony. The eligibility of taking testimony, in many cases, particularly the present, in preference to the delays, uncertainty, and enormous expenses that would inevitably attend the mode proposed by the motion, was clear to his mind.

Remarks of  
Mr. Ames.

After some desultory conversation, Mr. BENSON withdrew his proposition.

Mr. LEE proposed that the report should be recommitted, and the committee authorized to send for evidence, papers, and records, and report a special state of facts. He said it was the custom of the British House of Commons, upon similar occasions, to leave the whole business to a committee, and observed that the example of so old and so experienced

Remarks of  
Mr. Lee.

1789.  
1st Congress,  
1st Session.

a legislative body could be followed with safety and propriety.

This motion was withdrawn after some desultory conversation had taken place upon it.

The question on the report of the committee then recurred on the question whether the judges of the Supreme Court in New Jersey should be authorized to take depositions on the subject of facts alleged by the parties; when

Motion of Mr.  
Seney.

Mr. SENEY moved that Wednesday next be assigned for the parties to appear, and be heard by their counsel before the House, of which notice should be given, and that the committee be discharged.

Remarks of  
Mr. Livermore.

Mr. LIVERMORE observed that the House was much embarrassed. But, sir, said he, I foresaw it from the first appointment of the committee. I object to counsel being introduced into this House to discuss a previous question. The House is the judge in its own elections. We have appointed a committee to examine, but we have not vested them with power to determine. They have not so much as a power to hear. If we have pursued a wrong step, why should we proceed any further? Let the committee be discharged, and a day appointed to hear the parties. It is my determination to hear before I judge. The committee should be discharged if they cannot proceed without our aid.

The subject now before the House is material, and of the greatest importance; and although we have been heretofore wrong, we may now set ourselves right.

I have no objection that counsel should be heard upon the merits of the principal question. Though after an investigation of facts, we have determined in one instance, and why we cannot do the same now, I cannot conceive. Each House is to judge of the elections, returns, and qualifications of its own members. What means the word judge? Why, it corresponds with the ancient maxim, to hear and determine. Now, how can the House determine without hearing? If the House is to judge, we must bring all the evidence before us, although the committee may have heard it twenty times over.

Remarks of  
Mr. Madison.

Mr. MADISON thought, if the jurisdiction of the House was called in question, it would be proper to hear counsel on that point, because it must be indelicate to determine a question respecting their own jurisdiction, without hearing what could be advanced against it.

Remarks of  
Mr. Page.

Mr. PAGE was in favor of recommitting the report, and letting the committee proceed upon the duty to which they were originally appointed. He said, if the jurisdiction of the House was questioned, the parties had an indubitable right to be heard by counsel, and he hoped no gentleman would refuse the people of the United States a privilege of this important nature, which had been always enjoyed by the subjects of Great Britain.





1791.  
2d Congress,  
1st Session.

test, and a copy of the protest was, on a subsequent day, delivered into the Council.

5th. That there was no determination of the Governor and Privy Council in the premises, until the 18th of March, and that on the 19th he did issue his proclamation.

It was, on the 2d of September,

Are entitled  
to their seats.

“*Resolved*, That it appears to this House, upon full and mature consideration, that James Schureman, Lambert Cadwallader, Elias Boudinot, and Thomas Sinnickson were duly elected, and returned to serve in this House as representatives for the State of New Jersey, in the present Congress of the United States.”

## SECOND CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. LIVERMORE,  
BOUDINOT,  
GILES,  
GERRY,

Mr. BOURNE, of R. I.  
HILLHOUSE,  
STEEL.

Committee to  
report a mode  
of taking testi-  
mony in cases  
of contested  
elections.

On the 31st October, 1791, a committee was appointed to report a regular and uniform mode of proceeding in cases of contested elections of members of this House, consisting of Mr. AMES, Mr. DRAYTON, Mr. BROWN, Mr. FITZSIMMONS, and Mr. TUCKER. [Journal of the House.] An act of this character was passed the 23d January, 1798; see acts of that year, chapter 25.

## CASE III.

JOHN F. MERCER, of Maryland.

[The Executive authority of a State may receive the resignation of a member of the House of Representatives, and issue writs for a new election, without waiting to be informed by the House that a vacancy exists in the representation of that State.]

The facts on which the question in this case arose, were these, as they appear extended on the journal on the 9th of November, 1791. “The Speaker laid before the House a letter from the Governor of Maryland, enclosing a letter to him from William Pinkney, a member returned to serve in this House for the said State, containing his resignation of that appointment: also, a return of John Francis Mercer, elected a member to serve in this House, in the room of the said William Pinkney; which were read and ordered to be referred to the standing Committee of Elections.” On the 18th November, the committee made a report, which was

subsequently referred to a Committee of the Whole House, and on the 23d November, Mr. Muhlenberg reported to the House the following report as amended in the Committee of the Whole House; which was read, and agreed to:

1791.  
2d Congress,  
1st Session.

“That it appears that at an election held for the State of Maryland, on the 1st day of October, 1790, William Pinkney was duly elected a Representative for that State, to serve in the House of Representatives of the United States.

Report of the  
Committee of  
Elections.

“That the certificate of his election has been duly transmitted by the Executive thereof, and heretofore so reported by your committee.

“That by letter dated the 26th day of September, 1791, directed to the Governor and Council of the State, William Pinkney resigned that appointment: and that, in consequence of such resignation, the Executive issued a writ for an election to supply the vacancy thereby occasioned, and hath certified that John Francis Mercer was duly elected, by virtue of that writ, in pursuance of the law of the State of Maryland, in that case provided.”

On the motion to adopt the report of the Committee of Elections,

Mr. GILES said he was against too hasty an adoption of the report, as the subject was of a very important nature, and such as would materially affect the privileges of every member in the House. Two questions occurred in this business; the one, whether a person appointed to represent his State in Congress has the power of resignation; the other, whether that appointment can be resigned to the Executive of a State Government, and whether the Executive be authorized to accept the resignation, and issue a writ for a new election. If the report were received, as it then stood, he observed that it would authorize the Executive of every State to judge of all vacancies, and of the circumstances that may cause vacancies. He hoped the House would take time to consider the subject. The constitution says, that when vacancies happen, the Executive may issue writs to fill up those vacancies; but it does not say that resignation causes a vacancy; and if the Executive in the present instance judges of the circumstances that cause a vacancy, he may do it in every instance; in which case, the members of the House may be reduced to hold their seats on a very precarious tenure indeed. On the whole, he wished the determination might be postponed.

Mr. Giles op-  
posed to the  
reference.

Mr. BOUDINOT coincided in opinion with Mr. Giles, and thought the wellbeing of the House was deeply interested in the question whether the Executive of a State Government should interfere between a member of that House and his constituents. He moved that the report be committed to a Committee of the Whole House.

Remarks of  
Mr. Boudinot.

Mr. SENEY observed that this was no new case; that there were members sitting in the House who had been

Remarks of  
Mr. Seney.

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2d CONGRESS,  
1st Session.

elected in lieu of others who had resigned: he adverted to the inconvenience that must ensue to the State of Maryland from the delay, as that State would be deprived of the voice and support of one of her members. He thought it a new and very strange declaration to say that a member had not a right to resign. Such a doctrine must affect the privilege of every free citizen. Suppose a man who has a large family, and is engaged in a very extensive and lucrative business, should be elected contrary to his will, must a man so circumstanced be obliged to resign his business, and to take his seat in the House? He wished to have the matter decided, and saw no necessity of delay.

Remarks of  
Mr. Ames.

Mr. AMES thought he recollected to have heard Mr. Pinkney's name called in the list of the members, and that the Committee of Elections had reported him duly elected; the House, he observed, has a control over absent members; but if a member may resign when he pleases, he may do it out of the House, and withdraw himself from the power of the House whenever he thinks proper.

Remarks of  
Mr. Livermore.

Mr. LIVERMORE observed that if the transaction alluded to was merely an act of the State Executive, it might, with some degree of truth, be said to render the seat of every member precarious; but as it was supported by the laws of the State, he could not suppose it dangerous to the privileges of any member of the House.

Remarks of  
Mr. Sedgwick.

Mr. SEDGWICK thought it of some importance to determine upon what tenure the members were to hold their seats, and what circumstances were to vacate them. He, therefore, wished to have the question properly discussed, and that the report should be committed.

On motion, however, the House came to the following resolution:

Mr. Mercer declared entitled to take his seat.

*Resolved*, That John F. Mercer is entitled to take a seat in this House as one of the Representatives from the State of Maryland."

He was thereupon qualified, and took his seat the 6th February, 1792.

CASE IV.

1791.  
2d Congress,  
1st Session.

JAMES JACKSON vs. ANTHONY WAYNE, of Georgia.

[The law of Georgia requires that three magistrates should preside at elections: *held* that a return by three persons, two of whom were not magistrates, was defective.

In Georgia, if it appear, on a comparison of the return with the tax lists, that more votes are given than there are qualified voters, the fact will be regarded as evidence of corruption, and the return set aside.

It is not competent to the presiding officer at an election to set aside the same, after the legal poll is closed, and hold another election, and all undue practices by such officer may properly be inquired into, if the election is contested.]

Anthony Wayne having been returned, in the usual manner, as a member of the House from Georgia, the following petition was presented from James Jackson, of that State: Jackson vs. Wayne, of Ga. 14 Nov. 1791

The petition of James Jackson humbly sets forth:

That at the late election for members to represent the State of Georgia in your honorable House, for the present Congress, Gen. Anthony Wayne and your petitioner were candidates for the lower, or eastern district of the said State. That an improper and undue return has been made to your House of the said election: for that the county election of Effingham, in favor of the said Anthony Wayne, was illegal, there being nine more votes at the same than there were voters, and two of the persons presiding thereat were not qualified magistrates: for that the return of Glynn county, in favor of your petitioner, was suppressed: for that a false return was made to the Executive of the State, for the county of Camden, exceeding the numbers of the legal poll, which amounted to twenty-five votes, by the number of sixty-four votes, all of which were in favor of the said Anthony Wayne, and added together with the legal poll, very far exceeds the whole number of male inhabitants entitled to vote therein: and for that an illegal or pretended poll was held after the legal poll was closed, and on which illegal poll the aforesaid false return was founded; and the legal return, after being duly certified by the proper officer, was either suppressed or destroyed. Petition against sitting member.

He therefore prays your honorable House to postpone any determination, on the return of the said Anthony Wayne, for such reasonable period as will enable your petitioner to bring forward such proofs, respecting the premises, as the nature of his case may require.

JAMES JACKSON.

The original documents in this case, and others of that period, are said to have been destroyed when the Capitol

1791.  
2d CONGRESS,  
1st Session.

Allegations  
by petitioner.

was burnt, and the facts on which the petitioner relied as sufficient to vitiate the election, are but dimly shadowed forth in the recorded and official proceedings of the committee or the House. Such gleanings of them as were preserved by the newspapers of the day, have been referred to, and from them we learn that the following charges and allegations were made :

"1st. That the election in Effingham county was contrary to law, being held under the inspection of three persons, one of whom only was a justice of the peace, although the law requires that all three should be justices.\*

"2d. That there were nine more votes given, than there were voters duly qualified, in the county.

"3d. That the votes of Glynn county were suppressed, the return of them having been committed to the Hon. Judge Osborne, who had undertaken to transmit them to the Governor, but, instead thereof, had conveyed them to Anthony Wayne, the sitting member.

"4th. That after the closing of the legal poll of the county of Camden, the return of the votes (being 15 for Gen. Wayne, and 10 for Gen. Jackson, the petitioner) was delivered to Judge Osborne, the presiding officer, who, with some other persons, did afterwards hold a second election, and augmented the votes considerably in favor of Gen. Wayne.

"5th. Undue and corrupt practices at the election, as the setting down the names of persons as voters who were not present, and the keeping back the tax return for the county of Camden, which was the only check upon persons offering to vote." [See the Federal Gazette, printed at Philadelphia, of the 8th, 13th, and 28th February, 1792, in Cong. Lib.]

The petition was referred to the Committee of Elections, with instruction to report a proper mode of investigating and deciding thereupon.

The committee made a report, which was referred to a Committee of the Whole House, where several amendments were made, and reported to the House.

The said report being then further amended, is as follows :

Proofs to be  
confined to the  
allegations  
made.

"Resolved, That the evidence which may be offered on the part of the petitioner shall be confined to the proof of the articles of charge exhibited in the said petition against the validity of the return of the said election ; and

How to be taken.

"Resolved, That, on the trial, the deposition of a witness shall be received, which shall have been taken more than twenty-five days prior to the day assigned for the trial, before any justice or judge of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, or judge of a county court, or court of common pleas, of any of the United States, not being of counsel, or attorney to either the said Anthony Wayne, or the petitioner : provided that a

\* See the case of Easton vs. Scott, 2d session of the 14th Congress.

notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall have been first made out, and served on the adverse party, or his attorney especially authorized for that purpose, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance, after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. And every person deposing shall be carefully examined, and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition so taken, together with a certificate of the notice, if any, given to the adverse party, or his attorney, shall be sealed up by the said magistrate, and directed to the Speaker: provided, nevertheless, that no *ex parte* deposition shall be used on the trial of the said petition, which shall have been taken at any time before the 26th day of December next: provided, also, that evidence taken in any other manner than is hereinbefore directed, and not objected to by the parties, may, with the approbation of the House, be produced on the trial."

1792.  
2d CONGRESS,  
1st SESSION.  
Rules for taking testimony.

The 6th of February was assigned by the House for the trial of the cause; but, by the agreement of the parties, and on the application of the petitioner, it was postponed to the 27th of February, 1792, and, on that day, it was further continued, on the suggestion of the sitting member, to the 10th of March; on which day leave was granted to the sitting member, "to be heard by his counsel at the bar of the House" on the Monday following. Accordingly, on the 12th of March, 1792, the day appointed, "the sitting member, with his counsel, and the petitioner, being present at the bar of the House, application was made by the counsel for the sitting member further to postpone the hearing on the said trial until Wednesday se'nnight; on which application, the parties respectively being fully heard, and the question put thereupon, it passed in the negative."

The petitioner then proceeded to lay before the House his depositions and proofs in support of the allegations contained in his petition, and to explain them in a speech of great length. It will be recollected that one of the allegations charges undue practices upon Judge Osborne, who appears to have been one of the inspectors at the election for the county of Camden. He had been impeached before the Senate of the State of Georgia, and removed from office. One of the articles of the impeachment seems to have been founded upon his misconduct, touching this election, and application was made by the petitioner that "the decision of the Senate

Certain testimony tendered by petitioner declared inadmissible.



1792.  
2d CONGRESS,  
1st Session.

of the State of Georgia, on the impeachment of Judge Osborne, so far as respects the Camden return for a member to represent the State of Georgia, on the 3d day of January, 1791, be received as evidence in the present trial of that election, to establish the corruption of Judge Osborne." On this point the petitioner and the sitting member, by his counsel, being fully heard, it was decided that the evidence should not be received. Ayes, 20; Noes, 41.

Defence of sitting member.

After reading the proofs by the petitioner, the sitting member, by his counsel, entered on his defence, and produced sundry exhibits and proofs in opposition to the said charges. Whereupon, the House adjourned; and, on the next day, the counsel for the sitting member, having concluded his defence, and the petitioner having been heard in reply, both parties retired from the bar. Whereupon, a motion was made that "certain proceedings of the House of Representatives of the State of Georgia, accompanied with other papers, transmitted agreeably to their resolution, under the signature of the Governor, and the seal of the State, relative to the election of a member to represent the eastern district of the said State in this House, be received."

On the question of their admissibility, a debate arose, which was terminated by a call for the *previous question*, when it was decided that the evidence offered was inadmissible. Upon the final question being taken upon the legality of the election of the sitting member, it was unanimously

Decision  
against the sitting member.

"*Resolved*, That Anthony Wayne was not duly elected a member of this House."

Another motion was then made that the Speaker do transmit a copy of the said vote to the Executive of the State of Georgia; and debate arising thereon,

*Ordered*, That all further decision on the said contested election be postponed until Monday next.

MARCH 13, 1792.

Counsel for Gen. WAYNE, Mr. LEWIS. Gen. JACKSON appeared for himself.

Remarks of  
Mr. Lewis.

Mr. LEWIS appealed from the charges contained in the said petition, in support of the sitting member, and stated reasons why it would be proper in the House to grant a further postponement, which he moved for. The chief arguments were, that there was certain evidence expected by Gen. Wayne, which had not arrived from Savannah.

A debate of two hours took place upon the motion for postponement, which was negatived, 19 members only rising in the affirmative; consequently the trial commenced.

It was opened by a short exordium from Gen. Jackson, who was allowed to read and comment upon his evidence until past the usual hour of adjournment.



Mr. JACKSON observed that, whilst he acknowledged the unpleasant task of appearing as a prosecutor, and sincerely wished the occasion had never presented itself; and whilst he lamented that so much of the public time which was required to other important objects, had been expended, he could not help expressing the satisfaction he felt at the prospect of a decision on the Georgia election; nor could he forbear to observe that the doors of investigation could never be too widely extended on a business of such capital import, and where the liberties of the people were so materially interested.

1792.  
2d CONGRESS,  
1st Session.

Speech of Mr.  
Jackson, the  
petitioner.

One of the greatest advantages, he observed, of a free Government, was the right which every individual of the community possessed, of making the grievances he lay under known; but that what in a private man, where there had been a private injury, was a private right, became, in a public man, where a public grievance or injury to the community had taken place, a public and indispensable duty.

Possessing, therefore, the testimony he did, and being in the situation he was, a candidate at that election, and the person who, he believed, had justice been done, ought to have held the seat on that floor, he felt himself called on, in a double capacity, first, as a private individual, to assert his own rights, and, secondly, as a public man, to prevent an injury to the community—silence would have been inexcusable, and he should justly have been charged by his fellow-citizens as the betrayer of the rights of those whom he might most improperly term his constituents. He observed that it was but a short time since that a period had been put to a revolution, which, although glorious in its issue, was severe and bloody in its contests.

It was needless for him to remind the honorable House of the groundwork, the cause of that revolution, where so many of its members had participated in its dangers, and had been distinguished in its conflicts; that it must be well remembered that the avowed principle, the declared right of Britain to bind America in all cases whatsoever, without representation, was the cause. Sir, added he, the right of representation was what America fought for, seven long years, for which so many States were desolated, and for which so many heroes fell. Yet, strange as it might appear, scarce half a score of years had passed away ere this right had been violated and trampled on; trampled on ere the blood of our fellow-citizens, spilt in its defence, was as yet scarcely cold, and whilst the vestiges of the revolutionary war were still exposed to every eye.

To prove this—and, for the honor of human nature, he wished he could not—was the object of his petition, and his appearance at the bar of the House; that, in the prosecution, he wished the House to observe that it was not their favor, but their justice, which he demanded; that the names or

1792.  
2d CONGRESS,  
1st Session.

Speech of the  
petitioner.

merits of the sitting member, or himself, should not be known on the occasion, and that, for his own part, whatever might be the opinion of the honorable gentleman, of his merits or ability, he had not the vanity to suppose that his being in or out of Congress would affect the interest of America in the smallest degree; but that the question, abstractly considered, was a question of the greatest magnitude, in which the lives, the liberties, the fortunes, the happiness of the American people were materially involved; for it could not be denied that they all depended, in a greater or lesser degree, on the representation in that House; that the question was rendered more important by its being the first of its kind, and, therefore, would become the rule of decision in all future cases.

He then proceeded to state the facts and charges in his petition, and to make a few observations on them; that those observations should be as concise as possible, for he wished to address the House, not as a common jury, liable to be biased by prejudice, or to be imposed on by quibbles, but as the great guardians of the nation, sitting in a judicial capacity on a great and an important question, and in the decision of which the whole community was concerned.

After stating that he had testimony of another nature, which he had been prevented by the resolution from bringing forward, being tied down to the express articles of charge, which, in the Effingham election, were confined in two points, that of there being more votes than voters, and but one qualified magistrate presiding thereat, he proceeded to the investigation of those charges, and produced the following evidence:

First, the law of the State of Georgia for the election, by which he proved that the State was divided into three districts, that three magistrates were required to open a poll, that the poll was to be opened at nine o'clock on the 3d of January, 1791, and to be continued open until sunset; that the voters within the districts were to meet on the day of election in the respective counties, agreeably to the constitution, to elect, by ballot, one person for each district, agreeably to proclamation. He then produced the return of the election itself, which proved the charge of there being nine more votes than voters; and by the signatures of the three persons presiding, it appeared that but one of them had signed as a magistrate. He observed here that he should deem this sufficient if he brought no more evidence, but that he would now produce the testimony of Bell and Hudson, two of the persons acting at that election, to prove that they acted as private individuals, and in no other manner whatever. Mr. Bell's testimony went to prove that when he arrived at the place of election, he was accosted by Lane, the sheriff of the county, who then first apprised him of his appointment, and persuaded him to sit as a magistrate; that he refused at first,

saying he had no right, but afterwards agreed to sit, saying he might as well sit there as any where else ; that he refused to sign the return as a magistrate, and that he signed as an individual, and in no other manner ; that he was not at that time qualified : and in the cross-examination by Mr. Gibbons, he, on being asked if he had ever acted as a magistrate before that election, answered that he had never acted as a magistrate until that time.

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He next produced the testimony of Mr. Hudson, who proved much the same as Mr. Bell ; and added, that he found the people intoxicated between ten and eleven o'clock in the forenoon ; that Messrs. Gibbons, Moore, and Putnam, residents of Chatham, voted in Effingham ; that he gave up his opinion to Mr. Gibbons, that the magistrates were not qualified ; that a qualification was necessary, he produced the testimony of John Godlieb Meidlinger, clerk of the superior court of Effingham county, who proved that he never saw them act as magistrates before ; that he did not consider them as magistrates, and that they were qualified in open court after the day of election.

His exhibition  
of testimony.

Meidlinger, whose testimony was taken on behalf of the sitting member, likewise proved that the grand jury of the county had presented the election as illegal ; indeed, added Mr. Jackson, a qualification on oath is necessary, and is founded on the justest reasoning. Should not he be qualified on oath, who has the power to qualify on oath ? Should not he be bound by some tie, who has the personal liberty and property of his fellow-citizens so greatly at his disposal ? " Miserable is that servitude where the law is vague and uncertain," says a law author ; but much more miserable, he thought, would be that country where the public and private rights of a community would be at the will of a little despot of a justice, without any tie, human or divine. He did not mention this to censure the persons who had signed the return ; he knew them to be honest and well intentioned, and they had objected to sitting as magistrates themselves.

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It was in Georgia as it was in most other new countries ; to prevent greater evils the Government was compelled to appoint characters of this kind ; honest and upright persons who were totally unacquainted with the law ; men who generally did well when left to themselves, but who, when worked on by artful and designing persons, such as Lane the sheriff, who, you find by Bell's testimony, persuaded him to sit, and that he had a right to do so, although it was the first time he had heard of his appointment. Lyman, the attorney, whom you find informing Hudson, to induce him to sit, that he had spoken to the Governor, who had answered, " It did not make the least odds whether he was qualified or not ;" and this person, Gibbons, whose soul is faction, and whose life has been a scene of political corruption ; who never could be easy under Government—[Here Mr. JACKSON was called

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to order.] After apologizing to the House, he observed that he was commenting on facts; that the proofs were strong against Gibbons, of abominable corruption; that this corruption was, in a great measure, of his charges; that Gibbons had gone out of his own county, not merely to use an undue influence with the electors, but to corrupt even the magistrates themselves; that it was evident, that when he worked on those persons, they had given up their own opinions; and here he appealed to the evidence of Hudson, who swore that he had objected to Gibbons, Putnam, and Moore signing the return, but had been prevailed on by Gibbons, and had given up his own opinion to him, as Gibbons was an attorney at law, and he, Hudson, supposing him to know more of these matters than himself.

Mr. JACKSON likewise here appealed to the House, whether, if a law had been passed by Congress on elections, Mr. Gibbons's behavior would not have come under it, and whether an offender of the kind would not have been severely punished; that there would be no safety for the liberties of the people, if such corruptions could be permitted; you find, says he, the electors generally intoxicated by ten or eleven o'clock in the morning; the electors in that situation could not tell who they voted for. Why, he asked, were those individuals so solicitous to get those persons to sit, but that they supposed they would be more docile to their measures, and permit those to vote who had no right to vote?

Hence, he said, your honorable House find Gibbons, Moore, and Putnam voted in Effingham contrary to the law and constitution, giving their suffrages. [Here Mr. JACKSON produced the testimony of John Moore, which was objected to by Mr. LEWIS; but on argument it was admitted; who proved that one John King, a minor, had voted. Mr. Moore likewise proved that Gibbons, Lyman, and James Moore were very active in favor of Gen. Wayne, and that there were nine more votes than voters; and that Hudson had signed the return at the instigation of Gibbons.] Hence, too, he said, the House might perceive other irregularities, such as magistrates and clerks leaving the poll altogether, and hence, no doubt, the nine more votes than voters. [Here he produced the testimony of Thomas Wyllis, who corroborated the testimony before read, very fully, and proved that the poll was sometimes left by the justices and clerks; he further declared that he knew Bell and Hudson not to be qualified magistrates.]

And hence, he observed, the very return itself was drawn up by this Mr. Gibbons; what right had he to interfere with this return? But notwithstanding all this cunning and corruption of Gibbons, the very return was deficient. Were it not in the same bundle and under the same seal, there would be no knowing whether it was an election for a member of Congress or a member for the State Legislature; whether an election for the office of a coroner, or that of a constable.

[He here produced the return, which did not mention what the election was held for, but barely declares that at an election held at Elbertson, in the said county, the candidates were, &c.]

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Mr. JACKSON also observed that there was some testimony brought forward by the sitting member, to prove that a Mr. Lavier was a magistrate and a worthy man. Why, he would ask, did he go away? Why did he not sign the return, but that there were some such transactions going forward which he could not bring his mind to consent to? Mr. JACKSON made a variety of other observations, which continued until an adjournment was called for.

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Gen. JACKSON proceeded in his observations, and remarked to the House, that some members had been solicitous to see a law of Georgia where a qualification was rendered necessary, previous to a magistrate's entering on the duties of his office; that he had been uncertain yesterday whether he had the law present with him or not; that he now felt himself happy in being able to satisfy those members on that point. [He here produced the law, and which appeared positively to require the magistrates taking and subscribing the oath therein prescribed, previous to their entering on any official duty.]

Requisites of  
the Georgia  
election law.

Mr. JACKSON then observed that he would, as he was on the Effingham business, beg leave to produce the constitution of Georgia, to ground what he had advanced yesterday respecting the right of Mr. Gibbons, Mr. Putnam, and Mr. Moore's voting at Effingham. From the 1st section, 4th article of the constitution of Georgia, it required six months' residence in the county; this he read in his place, and said he considered the grounds of his charges respecting the Effingham return and election so well established, that he would take up no more time of the House on that business.

He observed to the House that the next charge was that of the suppression of the Glynn return; but as the House had been pleased to indulge him in the mode of conducting the prosecution, he would beg the permission to pass over the second, and come to the third charge, that for the county of Camden.

And here he came, he said, to a scene of iniquity indeed, a scene which had improved upon British corruption, and had left ancient and modern story all behind; we read, it is true, of a Roman consul who stole the votes from the forum, to prevent an election of the people, and we have heard of British sheriffs falsifying returns in favor of their friends; but here was a judge of the land, the great check upon the Executive Department, (and agreeably to the principles of free government, they ought to be separate and distinct,) acting as the Executive officer, the sacred guardian of the laws, the liberties, and privileges of his fellow-citizens, violating them all, and trampling them beneath his feet;

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who not only set down more votes than the county had, but added to the polls names which were never known. Here the sacred office of a judge became subservient to the views of party, and the possessor of it the tool of faction; but he forbore, he said, to animadvert on his notorious conduct; he had been tried, impartially tried; he had been convicted, and been punished; and by that punishment the character of his country had been restored. Yes, said he, Georgia, thou hast set an example worthy of thy elder sisters! thou hast hung out a warning to tyranny and its supporters! thou hast set an example which must be respected, and I trust will be followed, in similar circumstances, in the United States, to the end of time.

He would proceed to offer the evidence on the charges, and he begged leave to assure the House that he would conform as much as possible, in the mode of producing the evidence, to the wishes of some gentlemen yesterday; and the first testimony he would read would be that of Daniel Miller, who was one of the clerks of the check of the poll of Camden, and a necessary officer under the law of Georgia, which he produced, and whereby it appeared that the superintending officers at elections are empowered to appoint three clerks to attend, and to keep three rolls or checks, setting down the names of the voters therein, with the names of the candidates, &c. He observed that it would appear by Miller's testimony that he was one of these clerks; that the check was preserved, and sent on annexed to the testimony; that the whole number of votes at the legal poll was but twenty-five, fifteen for Gen. Wayne, and ten for himself; that the poll was closed agreeably to law, on or about sunset; that he had scarcely daylight to complete the return by which it was made out by him, and signed by the presiding magistrates outside the door; that a person by the name of Allen Thomas was spoken to, to carry the said express to the Governor; that the return was then lodged in his hands for safe keeping until the next day. This testimony Mr. Jackson read, which further proved that Mr. Osborne had taken the return from Miller, with a promise of returning it in the morning, Miller having been sent for by Osborne in the night; that Mr. Wright, one of the magistrates at the first poll, advised with Mr. Miller, with a proposal of Osborne's of adding the legal and the night election together, and to which Wright, at that time, seemed adverse, but afterwards consented, telling Miller that Osborne had not returned the first or legal return, having made out another more to his mind, having found fault with some of the words of the former, adding that Mr. Osborne was a very good patcher, and that, if it was a measure insupportable, he would not have done it, and that he had given up, as Miller believed, his opinion to the better one of Judge Osborne; Miller's testimony likewise proved that the legal return was sup-



pressed or destroyed. To corroborate the testimony of Miller, Mr. JACKSON observed, he would produce the testimony of Samuel Smith, the sheriff of Camden county, whose presence at the election was made necessary by law. Mr. Smith proved that he attended the election, performing the duty required of him. Mr. Smith proved that the poll was continued till after sunset ; that after the poll was closed, he saw the return made out by one of the clerks appointed to keep the checks ; that he saw it signed by the presiding magistrates, viz. Henry Wright, Langley Byan, and Hugh Brown.

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That an express was engaged to carry the return to the Governor, and that the number of votes at the said election did not exceed thirty ; that the business of the day being concluded, and it being then dark, he returned to his lodgings, two miles distant from the place of election ; that some time after he got there, he received a message from Osborne, requesting his return with the people there with him ; that he observed to those about him that he supposed the business of that day at an end, and that he should not return until next morning.

That, when he returned in the morning, he was told that a second poll had been held the evening before, a certified return of which he had seen, containing eighty-nine votes, and that he did not believe that, at that time, there were above seventy persons entitled to vote in the county. That he was well acquainted with Miller, who acted as one of the clerks of the check, and that he was a man of veracity, and well respected.

Mr. JACKSON next produced the testimony of Dr. John M. Scott, one of the surgeons of the first regiment of the United States ; a gentleman, he said, who had been as delicate in coming forward as his opposers could wish. It had been with difficulty he had procured his evidence, but Dr. Scott, when he did come forward, had given his testimony to prove that a second or illegal poll had been held. The doctor's evidence set forth that he was in Camden, at the station on St. Mary's, in the month of January, 1791 ; that he went to the election with some of the gentlemen in a boat ; that on the passage they fell in with Osborne.

That they arrived at Gray's about dark, and that Osborne examined Gray respecting the election, and begged him to come on board and pilot him to the place of election ; that Gray showed them the landing, and that a torch was brought them to show them where to land ; that, on going up to the house where the election was held, the judge inquired what time the people went away ; that it was answered the poll was closed at sundown ; that Osborne sent for several of the electors to return, and that the poll was again opened ; that the whole number did not exceed twenty ; that Mr. Seagrove's name was put down as a voter, but who was not



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present; that Osborne inquired of Gray the names of those who were not present at the first election, and that their names were likewise set down as voters; that he did not see a ticket or ballot given in; that he asked the judge if this was the common mode of doing business at elections in Georgia, to which Osborne replied to him, never to mind.

Mr. JACKSON now produced the affidavit of Gray, to which some objections were made by Mr. LEWIS, on behalf of the sitting member, and on which an argument, and reading the statement of the magistrate, was admitted. Gray corroborated the evidence of Dr. Scott in a full manner, and proved the absentees' names being set down to the poll, particularly Seagrove's and Goodbread's.

Mr. JACKSON next brought forward the testimony of Abner Williams, to which objections were likewise made by Mr. LEWIS, that it did not appear to be written in the magistrate's presence: many nice and refined distinctions and reasonings were given, and the testimony was ultimately rejected.

Mr. JACKSON observed that he had other testimony of the same nature from Camden, which, as the House had decided against the testimony of Williams, he should not produce.

From the testimony Gen. Jackson had produced, he thought he had fully established the iniquity and illegality of the Camden election, and he begged them to observe the chain of evidence; you find, says he, Miller, a public officer, doing his duty at the election, who swears that the legal poll consisted but of twenty-five votes, that fifteen were for Gen. Wayne, and ten for himself; you find the poll was closed at sundown, agreeably to law; you find that Miller had scarcely daylight to complete the return by; you find that the presiding magistrates, on that account, signed the return outside the door; you find the return delivered to Miller for safe keeping, and you find an express applied to; you find the number from Smith's testimony, who was the sheriff of the county, and a necessary officer at the poll, corroborating the testimony of Miller, that the number of votes did not exceed thirty; an express was absolutely engaged to carry the return to the Governor, and that after the law had been complied with, the electors had generally dispersed; you next find, by the testimony of Dr. Scott and Gray, the arrival of Mr. Osborne after dark, that a torch was brought to show them the landing; you find him sending again for the people, and here you observe the answer of the sheriff, that the business of that day was at an end, and he should not return: notwithstanding this caution, you view, from their evidence, Osborne proceeding to a second election, and setting down absentees' names, who were not present at the first poll, and among them James Seagrove and Philip Goodbread. You find here the question of Dr. Scott, is this the mode of conducting business at elections in Georgia? Why that question, said he, but that the honest dictates of a virtuous heart spurned

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at such abominable villany. Mark the answer of this iniquitous judge, "You never mind." Evasion, dark, designing evasion, which carried guilt in its countenance; he dared not explain; the deed would not bear the light. Shall we rest here a moment, said he, and search whence this right of proxy. Is it found in the laws or the constitution of the continent? Is it expressed in the laws or the constitution of Georgia? Is it to be met with in any of the laws or constitutions of the respective States? In France it is exploded; in England it is only admitted to the lords, whose right is hereditary; in no free country on earth, said he, is this right established. Shall the United States then be the first to soften this pernicious principle? Shall she who has lighted up the flame of liberty in other nations, who has astonished the universe, and loosened the trammels on the rights of men, be the first to nourish this tyrannic vulture in her bosom? View how far it leads, see how far it extends, and there is not a freeman who hears me, but must fire with indignation at the attempt. If admitted to one, shall we stop there? Shall we stop at ten, at twenty, at one hundred, or one hundred thousand? Shall we stop at a township, a county, a district, or a State? Sir, the glory of our constitution is that our rights are equal; and if one citizen may be permitted to vote by proxy, the whole rights of the community may be in like manner delegated, and the consequence might be, that a Dionysius or a Nero might be palmed upon us by authority. He did not like to be severe; he would repress what he felt, out of respect to the House; but with what view did this wicked judge come to that election? He was not actuated by a love of country, for his attempts, if successful, would have damned its liberty; not acting as a magistrate, because, as a magistrate, he was bound by the law, but here he was barefacedly breaking it; but void of principle, and, from his character, he believed he never possessed any; regardless of oaths, and worked on by prejudice and party, he came there at all events, and by any means, however base or abominable, to prevent his being elected.

Let it be remembered, sir, if this can obtain in Georgia, it can in other States, and the corruption will be general. But, supposing there is right of proxy admitted, he would produce the census of Georgia, under the official signature of the Secretary of State, taken by the marshal of the district of Georgia, whereby it would appear that the whole number of male inhabitants consisted of but eighty-one persons; here were eight more votes than the whole county contained, and sixty-four more than the legal poll; but, admit, said he, that there are as many voters as the return mentions, is it not extraordinary that, whilst other counties have polled but one-half, and some not one-fourth of its citizens, this county should have every elector attending? But let us take the two elections, said he, and add them together, and how will they then stand, as appears by the testimony before the

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House? Dr. Scott swears there were not more than twenty persons at the second election. Twenty, therefore, at the second election, and twenty-five at the first election, are but forty-five, so that forty-four votes are still wanting, at the utmost extent; but, take Gray's testimony, and this deficiency is much greater. [Mr. GILES here asked the question, whether the eighty-one male persons, returned by the census, were the persons above the age of 16 or 21.] Mr. JACKSON, after thanking the honorable gentleman for the question, as it had escaped him in observation, said that the eighty-one were the free males above 16, so that one-fifth of those, which was the nearest proportion, ought to be deducted for those between 16 and 21, and which would bring it to sixty-five; which number was corroborated by the testimony of Smith, the sheriff, who had sworn that the whole number of voters did not exceed, at that time, the amount of seventy. He observed that the testimony of Smith must be of weight, for he was the sheriff of the county, who knew, or must be supposed to know, all the residents, who summoned all jurors, and served all judicial processes.

Mr. JACKSON here begged leave to offer a statement he had made out, not as testimony, but to assist the minds of the House of those particular elections, and in the particular views in which they might be received.

*Statement of the poll for the Eastern District of Georgia, if all the county returns had been received, and had been proper.*

	WAYNE.	JACKSON.
Chatham, . . . . .	90	169
Liberty, . . . . .	7	62
Effingham, . . . . .	90	17
Glynn, . . . . .	12	15
Camden, . . . . .	79	10
	<hr/>	<hr/>
	278	273
	273	<hr/>
	<hr/>	
Majority for General Wayne, .	5	

*Statement.*

If nine more votes than voters in Effingham had been reduced in proportion, say seven from Wayne, and two from Jackson, which is the nearest ratio of reduction, numbers would have stood, Wayne 271, Jackson 221.

Statement, leaving Glynn return out, and supposing the others good. 1792.  
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	WAYNE.	JACKSON.
Chatham, . . . . .	90	149
Liberty, . . . . .	7	62
Effingham, . . . . .	90	17
Camden, . . . . .	79	10
	<hr/>	<hr/>
	266	238
	238	<hr/>
	<hr/>	
Majority for Wayne, .	28	

Statement rejecting the Effingham election as illegal, there being but one qualified magistrate, and nine votes more than voters.

	WAYNE.	JACKSON.
Chatham, . . . . .	90	149
Liberty, . . . . .	7	62
Camden, . . . . .	90	17
	<hr/>	<hr/>
	187	228
	<hr/>	187
		<hr/>
Majority for Jackson, .		41

Statement, including the legal poll for Camden, suppressed, agreeably to the testimony of Miller.

	WAYNE.	JACKSON.
Chatham, . . . . .	90	149
Liberty, . . . . .	7	62
Effingham, . . . . .	90	17
Camden, . . . . .	15	10
	<hr/>	<hr/>
	202	238
	<hr/>	202
		<hr/>
Majority for Jackson, .		36

Statement, allowing Camden suppressed return, and throwing out Effingham.

	WAYNE.	JACKSON.
Chatham, . . . . .	90	149
Liberty, . . . . .	7	62
Camden, . . . . .	15	10
	<hr/>	<hr/>
	112	221
	<hr/>	112
		<hr/>
Majority for Jackson, .		109

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N. B. This last statement shows the true state of the poll, as the Legislature of Georgia considered it.

[Here Mr. BARNWELL interrupted Mr. JACKSON, as did also Mr. BENSON, by opposing the reading of any calculation; but Mr. MADISON insisted that the petitioner had a right to state the numbers at the different polls; and he then proceeded, by observing that he should now close his evidence and observations on the Camden election; he thought he had perfectly established his charges on this head, as well as on the Effingham election; he had proved that the legal return had been suppressed, and that the second election had been illegal altogether.]

He would now proceed to the last article of charge, the Glynn return, and here he should offer the testimony of Col. Samuel Hammond, a gentleman of the greatest veracity, who would prove—[Here Mr. JACKSON was called on by Mr. LEWIS to produce the evidence, and was desired not to inform the House of the contents of the testimony.]

Mr. LEWIS objected to Col. Hammond's evidence, on the grounds he had formerly made to the testimony of Williams, and, on argument, it was finally rejected.

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Mr. JACKSON here observed that it was not for him to do otherwise than suppose that the decision of the House was proper, however hard it might bear on him, which, he must be permitted to say, it did; that, however, by the failure of the receipt of this testimony, his charge must fall to the ground, as the evidence of Hammond was the principal ground on which he rested his charge, and that he must, therefore, decline bringing forward the other testimonies relating to this business before the House.

He said he felt himself now bound in duty to produce to the House the decision of the State of Georgia on the impeachment of Judge Osborne, and he did not produce it without an expectation of its being objected to, but he begged leave to offer some reasons why it should be received.

Baron Gilbert, in his excellent treatise on evidence, had quoted Mr. Locke, to prove that the degrees of evidence were various, and that they extended from perfect certainty and demonstration, quite down to improbability and unlikelihood, even to the confines of impossibility. Perfect certainty was defined to be a clear and distinct perception with one's own senses; probabilities, on which, in a greater or lesser degree, all other evidence rested, consisted of obscure views, or what was seen or heard by the report of others. The first kind of evidence was not in the power of the House, because none of the facts alleged were within their views; but they were compelled to, and did, by their resolutions, depend on the second kind of evidence, or what was heard by the report of others in Georgia. The House, in receiving the testimony offered, would receive evidence

taken at least on as careful grounds as that taken under the resolutions; the facts were the same; the point at issue was the same, whether corruption had, or had not taken place at this election; the person accused was present, with his attorneys, to cross-examine; two of the attorneys of the sitting member were employed as counsel, on that occasion, for Mr. Osborne, and one of them actually cross-examined the evidence; it must, therefore, be supposed that, from the exalted station of that gentleman, every industry would be used, every exertion be made by them, as well to clear the character of their client in Georgia, as to establish the right of the sitting member here. It was, he said, a decision of the highest court of the State of Georgia, founded on an express article of the constitution—a court having competent jurisdiction to decide, and an authority which the members of that State here were not only called on to acknowledge, but to respect. A decision of faction, he said, it could not be supposed, for who ever heard of a unanimous faction. Faction signified a party in a State; here was a political phenomenon, which did not happen in a political age—a whole people of one way of thinking—a House of Representatives unanimously convicting. How, he asked, should the voice of the people be known? Here were but two ways: by petition from the people at large, or by the declared sense of the Legislature. If he had taken the former, would not the gentleman have come forward to object to it? Would not there have been room to charge him with undue influence in procuring it? The voice of the people, therefore, would be best known by the Legislature of the State; for, notwithstanding the nice spun sophistry of the day, he could not distinguish between the people and the State. Who was the State, but the society which compose it? Who, then, were the people but the State? Would Congress, then, not receive the sense of the State of Georgia? Would they hush that voice which says, we are not represented? Would not the world perceive how short-lived republican virtues were, and the British King behold acts for which they had denominated him a tyrant? The Government was founded on the basis of the States and people, and, at least, a decent respect should be so far paid them as to receive their complaints. If it be said, said he, that Congress have the sole power of judging of the returns, elections, and qualifications of its own members, without denying this position, he would beg leave to observe, there were powers delegated by the constitution which were not exclusive; that a power was given to the States to prescribe the times, manner, and place for holding elections, but Congress might alter those regulations. Here, then, was a right in Congress which was not exercised; the States were in the exercise of this power; every member in the House had been elected under State laws; the State officers executed the laws;

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petitioner.

and who had cognizance of their malfeasance but the States under whom those officers held their appointments? Besides, who, he said, could so well detect corruption as the States, who were so much interested to do it? Could Congress detect this corruption? Would individuals hazard their lives and fortunes, at the end of every election, to attend Congress to inform them of it? Would Congress establish inquisitions in the respective States, to find it out? Would the people of America submit to inquisitions? Had Congress the power to compel evidence to attend? Where was their law? where their compulsory process? He had seen neither. But, suppose all this got over, and corruption detected, can Congress punish the authors of it? Here, again, he would ask for their law, their power to do so; and even then, could they dismiss the State officers convicted of corruption? Sir, added he, could the united wisdom of this House have removed Mr. Osborne from the bench of Georgia? Secure in his seat, he would have minded the fulminations of Congress no more than the fulminations of the court of Rome.

But, he supposed, it would be objected to on another ground, that it was not agreeably to the strict rules of law, and therefore inadmissible, as the parties were not the same. Although he admitted, in some degree, that the doctrine might hold, yet still it was not unfrequently allowed to admit decisions in other courts, on trials between other parties. Thus, for instance, a sentence of a court of admiralty, where goods had been condemned in a case of piracy, was admitted as evidence in a court of common law, in an action of trover. A sentence, in an ecclesiastical court, was admitted as evidence of the right to the thing there decreed. A decree in chancery was not unusually admitted at common law. And he recollected one strong case, where a judgment of ouster against the bailiffs of a corporation was admitted as evidence against the person claiming a title under their election. This last case was precisely in point, and he begged leave to impress it on the House, and the sitting member, claimed under the return of Mr. Osborne. He acknowledged the advantage the learned counsel had of him here, having his books to resort to, but he did not mean to rest fully on those cases, because he conceived the House bound by their own laws, and not by the laws of any inferior court; but, where could be the danger of admitting it? Were the House a common jury, liable to be imposed on by artifice, or biassed by prejudice, they could not examine the evidence, reject what ought to be rejected, and suffer that to impress them which ought to impress them.

Here Mr. Lewis objected to the admission of these papers, and was astonished that they should be offered to the House. He argued that the impeachment of Judge Osborne was unconnected with the business in question; that it was altogether



*ex parte*, and therefore hoped the House would reject it, and not suffer the proceedings of the State of Georgia, dignified as it was, to influence Congress in a matter which was entirely within their own jurisdiction.

The House refused to receive them.

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2d Congress,  
1st Session.

MONDAY, MARCH 19, 1792.

The House resumed the consideration of the case when a motion was made that the House do come to the following resolution :

**“Resolved,** That the petitioner, James Jackson, is entitled to a seat in this House as a member for the lower district of Georgia; and that the right of petitioning against the right of the said James Jackson be reserved to all persons, at any time during the term for which he was elected.”

This resolution was debated until the 21st, when a motion was made that the House do agree to the said resolution, amended to read as follows :

**“Resolved,** That James Jackson is entitled to take a seat in this House, and that the right of petitioning against the right of said James Jackson be reserved to all persons, at any time during the term for which he was elected.”

Which was decided in the negative. Yeas, 29; Nays, 29; the Speaker voting in the negative. Whereupon,

**“Resolved,** That the seat of Anthony Wayne, as a member of this House, is, and the same is declared to be, vacant.”

The seat declared vacant.

**Ordered,** That the Speaker transmit a copy of the preceding resolution, and of this order, to the Executive of the State of Georgia, to the end that the said Executive may issue writs of election to fill the said vacancy.

MARCH 20, 1792.

The usual business of reading petitions being over, the several orders of the day were called for, and various motions made, all of which gave place to one from Mr. W. SMITH, proposing this resolution, viz. That the seat of Anthony Wayne, as a member of this House, is vacant; and that notice be served on the Executive of the State of Georgia, in order that they may issue a writ for a new election.

This motion was objected to as not being sufficiently comprehensive to express the sense of the House; on the contrary, it seemed to be intended to prevent the introduction of a resolution which was proposed by Mr. GILES, viz.

**“Resolved,** That James Jackson is entitled to a seat in this House.” To both of those motions several amendments, substitutes, &c. were proposed, and Mr. Giles’s motion was modified so as to read thus: **“Resolved,** That James Jackson is duly elected, and, therefore, entitled to a seat in this House.”

1792.  
2d CONGRESS,  
1st SESSION.

Remarks of  
Mr. Giles.

Mr. GILES supported this motion by a train of judicious and well applied arguments, drawn from the precedents of the British Government; he particularly mentioned the Middlesex election, when Mr. Wilkes was expelled the House of Commons, for having been tried and found guilty of an abominable libel; in which case a writ for a new election was issued, because there was not then any other candidate; but when afterwards there was a candidate set up against Mr. Wilkes, the House of Commons did not order a new writ to issue, they declared the other candidate duly elected, having previously decided that Mr. Wilkes was ineligible to a seat in the House. This, although it may not be reckoned exactly a case in point, comes something near to the Georgia election; and from this and a variety of other cases, which Mr. GILES quoted, he thought the House would be highly justifiable in declaring Gen. Jackson duly elected, and therefore entitled to a seat in the House of Representatives.

Mr. GILES further observed that the consequence of not agreeing to the resolution he had the honor to propose, would be a disavowal of the right of the judicial powers of the House in cases where they were to decide upon the qualifications of their own members, and it would be transferring those powers to the Executives of the States, if Mr. Smith's motion should obtain.

Remarks of  
Mr. Smith.

Mr. W. SMITH rose to oppose Mr. Giles's motion, and entered into a very extensive chain of argument on the rights of election, the powers of Congress, the danger of foreclosing the chair of the sitting member, should he desire to impeach the validity of the petitioner's election; the want of reciprocity that would ensue from an adoption of the resolution; the danger of so bad a precedent; the deprivation of the rights of Georgia to hold a new election to fill the vacancy, &c. &c.

He also quoted almost all the cases of contested elections in Great Britain, and drew inferences from each in favor of his own opinion. He said the business before the House was not to take cognizance of Gen. Jackson's right to a seat, it had been no more than to investigate the legality of Gen. Wayne's seat, which was now decided in the negative; it was not a contest between Gen. Wayne and Gen. Jackson, but an inquiry into a return.

Mr. GILES proposed to amend his motion by adding these words, "and that the right of petitioning against the said election (of James Jackson) be preserved to all persons, &c. within the time for which he was elected."

Remarks of  
Mr. Madison.

Mr. MADISON replied generally to all the reasoning of the gentlemen who had gone before him in this business; he mentioned the general rule, that whosoever had a majority of sound votes was the legal Representative; he then recited several exceptions to this rule, and expatiated on the *lex parliamentaria*. In addition to the cases quoted by Mr. GILES

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and Mr. W. SMITH, he mentioned one wherein corruption appeared in both candidates, and the seat was adjudged to him who had the greatest number of sound votes; but this, he said, was not a case exactly in point: he therefore believed it would be necessary to decide the present one agreeably to the constitution and right reason. He had ventured an opinion formerly upon an occasion of this kind, and he would now confess that if the House could, conformably to reason, precedents, or conveniency, admit the petitioning member to a seat, he believed that they ought to do it, in order to fill up the chasm in the House, so far as relates to the representation and interest of the State of Georgia. He differed in opinion with those who had argued that the petitioner had not claimed his seat; and even admitting he had done so, or that he would resign or refuse to accept it, still the House are bound to declare and establish his right.

MARCH 21, 1792.

On the motion of Mr. GILES, respecting the right of Gen. Jackson to a seat in the House,

Mr. Boudinot rose to deliver his opinion; previous to which, he thought proper to recapitulate most of the circumstances which have come into view, before the House, from the time of receiving Gen. Jackson's petition to the present time, of declaring whether he is, or is not, entitled to the seat in the House of Representatives.

Remarks of  
Mr. Boudinot.

He took particular notice that there were only two candidates for the lower district of Georgia; no third candidate had been set up. Hence, as there were only two, and one of them has been proved to be illegally elected, it remains to be decided whether the other be entitled to the seat.

He observed that in three of the counties the whole of their elections were null and void, and that, with respect to the others, all the evidence which would be necessary to an investigation has not been yet before the House, as no other evidence has been adduced but such as was thought necessary to vacate the contested seat; consequently the evidence admitted in one case cannot be admitted in another, and if Congress proceed in the question now under consideration, they must do it without the cognizance of Georgia, and without any return by them made in favor of the petitioner; besides, it will be doing an essential injury to the sitting member, should it appear that he had a majority of votes exclusive of all the illegal ones, as it will be precluding him from all redress, to declare the petitioner the sitting member.

Mr. Boudinot also quoted the case of the Maryland election of Mr. Pinkney, who had resigned; yet the next candidate in number of votes was not declared; a new election was held. Upon the whole, after considerable time spent in reasoning nearly on similar grounds with those of Mr. W.

1793.  
3d Congress,  
1st Session.  
Report of Com-  
mittee of Elec-  
tions.

On the 10th February, 1794, the committee made the following report, to wit: "That the said Henry Latimer complains of the illegality of the said election on the following grounds, to wit: that the Legislature of the State of Delaware, in pursuance of the constitution of the United States, passed an act on the 26th October, 1790, directing the election of a Representative for the said State in the Congress of the United States, by which it is enacted that every person coming to vote for a Representative, agreeably to the directions of the said act, shall deliver, in writing, on one ticket, or piece of paper, the names of two persons, inhabitants of the State, one of whom, at least, shall not be an inhabitant of the same county with himself, to be voted for as Representative.

"That, at the said election in Newcastle county, a number of votes or tickets, containing the names of the said Henry Latimer and Solomon Maxwell, both inhabitants of the same county, were, by the judges of the said election, deemed illegal, and rejected.

"That, at the said election in Kent county, four votes or tickets, containing the names of the said Henry Latimer and George Truit, both inhabitants of Newcastle county, were, by the judges of the election, rejected as illegal.

"That, at the election in Sussex county, a number of votes or tickets, not less than fifty, containing the name of John Patton only, as the Representative of the said State, were received by the judges of the election, polled, counted, and included in the return of the said election. That in consequence of the rejection of the said votes in Kent county, and the reception of the votes before mentioned in Sussex county, the said John Patton was returned as exceeding the said Henry Latimer thirty in number of votes.

Election law of  
Delaware.

"The committee find that the law of the State of Delaware for regulating the election of a member to this House, contains the regulation stated in the petition, and that the said John Patton was returned to the president of the State of Delaware as having 2,273 votes, and the said Henry Latimer as having 2,243 votes. On examining the evidence taken in this case, the committee find the following facts in relation to the election in Newcastle county, to wit:

"That a considerable number of votes or tickets containing the names of Henry Latimer and Solomon Maxwell were rejected as illegal, as being both inhabitants of Newcastle county; the precise number of said votes is not ascertained. One witness, Robert Hamilton, who acted as an inspector or judge of the election, declaring that he kept a list of such rejected votes till he was fatigued; that when he discontinued, they amounted to upwards of seventy. Another witness, James Eves, who likewise acted as an inspector at the said election, declaring that he first began to keep such a list of rejected votes, and counted upwards of thirty, when

he changed seats with Hamilton, who continued to keep the said list, as above mentioned, and that he was informed by Hamilton, some hours before the reading of the votes was concluded, that the number of the said rejected votes then amounted to upwards of fifty. It appears, by a reference to official documents, that the amount of votes counted and polled at the election in the said county for Governor of the State was 1,902, and the number polled and counted for a member of this House was only 1,138, constituting a difference of sixty-four votes. The committee find the following facts in relation to Kent county: that four votes or tickets having the names of Henry Latimer and George Truit, both inhabitants of Newcastle county, were, on that account, rejected as illegal; and that twenty-two votes or tickets, containing the names of John Patton and some other inhabitants of Kent county, were likewise rejected as illegal.

1798.  
3d Congress,  
1st Session.

Report of Com-  
mittee of Elec-  
tions.

“The following facts appear in relation to Sussex county: That at the commencement of the election in the said county a question arose as to the legality of votes or tickets containing only one name, and, after some contest, it was resolved by the managers of the election to receive all such votes, and to leave the determination of their legality to the House of Representatives of the United States. It further appears, by the evidence, that, on a late examination of the votes or tickets which had been polled or counted at the said election, there were sixty-eight single votes received and counted for John Patton, and nine single votes for Henry Latimer.

State of facts.

“From the above statement of facts, the following conclusions appear to the committee to result:

“That John Patton was returned as duly elected, by a majority of thirty votes.

“That, agreeably to the election law of Delaware, the four votes in Kent county, containing the names of Henry Latimer and George Truit, which were rejected, ought to have been received and counted for Henry Latimer; and the sixty-eight single votes in Sussex county, which were received and counted for the said John Patton, ought to have been rejected; that if the aforesaid four votes in Kent county had been received, and the aforesaid sixty-eight votes in Sussex county had been rejected, as was required by law, the said Henry Latimer would have had, after deducting the nine single votes, received and counted for him in Sussex county, a majority of thirty-three votes. The committee are, therefore, of opinion that John Patton is not entitled to a seat in this House; they are also of opinion that Henry Latimer is entitled to a seat in this House as the Representative of the State of Delaware.”

Opinion of  
committee ad-  
verse to sitting  
member.

1793.  
3d Congress,  
1st Session

## Statement.

Votes for John Patton, . . . . .	2,278
Deduct single votes in Sussex county, . . . . .	68
	<hr/>
	2,205
	<hr/>
Votes for Henry Latimer, . . . . .	2,243
Add rejected votes in Kent, . . . . .	4
	<hr/>
	2,247
Deduct bad votes in Sussex, . . . . .	9
	<hr/>
	2,238
	<hr/>
Majority for Henry Latimer, . . . . .	33

This report was committed to the Committee of the Whole House, accompanied by certain written observations thereon by the sitting member, tending to controvert the reasoning and conclusions of the said report.

FEBRUARY 13, 1794.

On motion,

“*Resolved*, That the Committee of the Whole House be discharged, and that the hearing on the trial of the said contested election be now proceeded on in the House.”

The petitioner was admitted to the bar of the House, to be heard in support of the allegations of his petition.

The House then proceeded to the hearing of the trial of said contested election. Depositions and other exhibits were read, as well as the written observations of the sitting member thereupon, and then the House adjourned.

On the following day, after further proceedings thereon, and the parties had retired from the bar, the House proceeded to a decision; and, after debate, a motion was made that the House do agree to the following resolution:

“*Resolved*, That John Patton is not entitled to a seat in this House.”

Which being decided in the affirmative, on motion,

Petitioner entitled to his seat. “*Resolved*, That Henry Latimer is entitled to a seat in this House as the Representative of the State of Delaware.”  
Ayes, 57; Noes, 31.



1793.  
3d CONGRESS,  
1st Session.

CASE VI.

HENRY K. VAN RENSSELAER vs. JOHN E. VAN ALLEN, of  
*New York.*

[Irregularities in the conducting of the election were complained of :

- 1st. More votes actually given than were computed by the inspectors.
- 2d. Ballot box not locked.
- 3d. Ballot box in custody of a person not authorized by law to take charge of it.]

On the 6th December, 1793, the petition of Henry K. Van Rensselaer was presented to the House, complaining of the undue election and return of John E. Van Allen as a member from the State of New York, and the usual reference having been made, the committee, on the 9th December, made a report, as follows :

That it appears, from the said petition, that the election of the said John E. Van Allen is impeached by the petitioner on the following grounds, viz.

1st. That in Stephentown, which is comprehended within the election district from which the said John E. Van Allen is returned, there were more votes actually given for the petitioner than appear, from the return of the committee who were appointed by law to canvass and estimate the votes, to have been canvassed and counted. Irregularities in the election complained of.

2d. That in the town of Hosack, also included in the said district, the ballot box was not locked agreeably to law, but was only tied with tape.

3d. That, at the time of the election, the said John E. Van Allen, who was not an inspector of the election, had in his possession the ballot box of the town of Rensselaerwick, which is also comprehended in the said district. That the facts above set forth being contested by the said John E. Van Allen, the sitting member, your committee request the direction of the House with respect to the mode of investigating the same."

It does not appear that any instruction was given by the House, but we find that on the 18th December the same Committee of Elections made a further report, which was in the following words :

"That your committee have received from Lewis A. Scott, Secretary of the State of New York, a list of the number of votes in each town, in the counties of Rensselaer and Clinton, for John E. Van Allen and Henry K. Van Rensselaer, which list has been admitted by the said sitting member, and petitioner, to be a true and correct state of the ballots, estimated and canvassed at the said election. Report of committee that the irregularities are not sufficient to vitiate the election.



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3d CONGRESS,  
1st Session.

"It appears to your committee that the allegations in regard to Stephentown, viz. 'that the petitioner had a greater number of votes in the said town, than was returned to be estimated and canvassed,' even if proved, would not, consistently with the law of the State of New York, be sufficient to set aside the votes given at the election in the said town: that even should the irregularities complained of, with respect to the elections of the towns of Hosack and Rensselaerwick, be sufficient to set aside the votes given in the said towns, still it appears that the said John E. Van Allen has a majority of the remaining votes of the district composed of the counties of Rensselaer and Clinton."

This report having been committed to a Committee of the Whole House, on the 20th December the Committee of the Whole House was discharged.

DECEMBER 20, 1793.

In Committee of the Whole on the report of the Committee of Elections, respecting the election of J. E. Van Allen, the petition of Mr. Henry K. Van Rensselaer, the two reports of the Committee of Elections, and the election law of the State of New York, were read by the Clerk.

Remarks of  
Mr. Lea.

Mr. LEA stated a number of facts as connected with this business, and added the following questions, viz.

Of the effect  
of irregularities  
on elections.

1. Whether irregularities not deemed by the law of New York sufficient to nullify the votes given, shall be regarded by the House of Representatives as having that effect. None of the irregularities observed by Mr. Lea were regarded by the law of New York as sufficient to vitiate the returns of votes made by the inspectors, who are sworn officers, and subject to pains and penalties for failure of duty. If the law of New York is to be observed as a sovereign rule on this occasion, the allegations do not state any facts so material as to require the interference of the House of Representatives.

2. Whether, setting aside this first principle, mere irregularities, not alleged to have proceeded from corruption, shall nullify the return of sworn officers; and whether the House of Representatives ought to countenance and inquire into the mere implications of such serious crimes as perjury and corruption, or should require such charges to be expressly and specifically made.

3. Whether it is not an indispensable requisite to the existence of a representative Government, that, at every election, a choice should be made.

4. Whether, to ensure such choice, it be not necessary that this principle should be established, that a majority of legal votes, legally given, should decide the issue of an election.

5. Whether, therefore, partial corruption should be deemed sufficient to nullify an election, or only sufficient to vitiate the votes given under such corruption, leaving the election to be decided by the sound votes, however few.

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6. Whether, if partial corruption should be deemed sufficient to nullify an election, such corruption should not extend to the major part of the votes given; and if the major part of the votes be deemed sound, the fate of the election should not depend on the plurality of votes in such major part.

Mr. LEA observed that this last was the opinion of the committee, and they have stated facts according to this opinion; and finding a major part of the votes duly given and canvassed, and that J. E. Van Allen had a plurality of such major part, they have determined that he was duly returned to serve in the present Congress.

A variety of objections were offered to the report of the Committee of Elections, that it did not contain so full a statement of facts as would warrant the Committee of the Whole in deciding on the merits of the election. Sundry allegations of the petitioners devolved inquiries on the part of the committee, which not only affected the purity of elections, but the privileges of the House, and their right to judge of the qualifications of its members. These inquiries might enable the committee to determine the number of votes actually given, and the validity of those votes. That the act of the State of New York should be suffered to operate in this case so as to exclude from the House a knowledge of the full amount of the number of votes given, appeared very extraordinary. The respective Houses of Congress possess exclusively the right to judge of the qualifications of their own members. This right includes, evidently, full power to ascertain, with precision, the actual state of the polls. If the votes of the citizens, freely and fairly given, can, under any pretext whatever, be suppressed, the effectual rights of suffrage are at an end. It was observed that corruption in elections was the door at which corruption would creep into the House; that it appeared to be admitted there had been irregularities in some of the towns in the district in question; but it had been made a question, not whether corruption generally should vitiate an election, but what quantum should be sufficient for that purpose; so that corruption was considered, in relation to an election, by weight or measure. The allegations of the petitioner were urged in support of these objections. These stated sundry irregularities, in relation to the returns not corresponding with the number of votes given in several towns, the boxes not being properly secured, which conveyed the votes to the canvassing committee, one of which had been deposited in the House of the sitting member for a number of hours, &c.

Objections to  
the report stated.

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1st Session.

Reasoning in  
support of the  
committee's re-  
port.

In support of the Committee of Elections, report, it was observed that the allegations in the petition showed that the principal support it rested on was, that the returning officers of some of the towns in the district from which the sitting member came, had rejected a number of votes given in for the petitioner. It was shown, from the provision of the election law of New York, that these votes might have been legally rejected. The petition stated that numbers of persons had sworn that they had voted for the petitioner, whose votes, by the returns, it does not appear, were counted. On this it was observed that the committee did not consider this allegation of a nature proper to engage their attention. It was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it is well known that persons had, on such occasions, frequently put in a ballot for the person he had not intended to vote for. In the hurry and confusion which often take place, the ballots get shifted, and one is put in in lieu of another. To the objection of the law of the State of New York, drawn from the constitution of the United States, it was replied that the regulating the "time, place, and manner" of holding elections is expressly vested in the State Legislatures. These necessarily include a great variety of incidental circumstances, which must also be left to their discretion. Congress cannot enter into a consideration of the minutiae of the business. The different customs of the several States will not admit of one uniform system. With respect to the box which contained part of the votes having been deposited in the house of the sitting member, it was observed that no imputation was conveyed against him in the petition on that account. It did not appear that the number of votes it contained had been either increased or diminished; nor was there any charge against him of being accessory to any unfair practices in the election. The committee had taken cognizance of every fact that had come into their possession, and the result was before the Committee of the Whole. It was further stated by one of the Committee of Elections that the only question to be determined was, whether the irregularity of the votes in two towns in a district consisting of ten towns, in case the votes of those two towns do not amount to a majority of the whole number of the votes in the district, such irregularity shall vitiate the election of such district.

Some observations were made by several gentlemen on the different modes of voting by ballot, and *viva voce*.

Remarks of  
Mr. Watts.

Mr. WATTS explained the process under the election law of New York, and stated the principles on which votes particularly circumstanced were rejected, and the accidents by which they were sometimes omitted in the general canvass.

The committee, on the whole, did not appear to be ripe for a decision; they, therefore, rose, and reported progress; and, after rejecting a motion that the Committee of Elections should be instructed to report a statement of the facts in their possession, (which several of the committee said they had already done,) the House adjourned without coming to a vote on the report.

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3d Congress,  
1st Session.

On the 24th, a motion being made to recommit it to the Committee of Elections, it was, after debate, negatived, and the following resolutions passed, to wit:

*Resolved*, That this House doth disagree to the said report.

*Resolved*, That the allegations of the petitioner do not state corruption, nor irregularities of sufficient magnitude, under the law of New York, to invalidate the election and return of John E. Van Allen, to serve as a member of this House; and that, therefore, the said John E. Van Allen is duly elected.”

Sitting member  
duly elected.

DECEMBER 26, 1793.

Mr. VAN ALLEN, after observing that though the House had decided on the legality of his election, yet as the allegations contained in the petition of Mr. Van Rensselaer conveyed some reflections on his (Mr. Van Allen's) character, and being now in possession of several affidavits, which would, he supposed, remove every injurious impression, if any existed, from the minds of the members respecting his conduct, wished they might be read for their information.

Remarks of  
Mr. Van Allen.

The Clerk then read one of the affidavits, and was proceeding, when Mr. FRTZSIMONS stated some objections to the reading, as he did not see that the House could take any order on them. The reading of the affidavits was waived.

A memorial from the inspectors of the election for the town of Stephentown, was then read, complaining of the misrepresentation of their conduct by the petition of Mr. Van Rensselaer; this being read, on motion of Mr. LEA, it was voted that leave be given to withdraw the petition and affidavit, it having been observed by Mr. LEA, that the object of Mr. VAN ALLEN was fully answered by the communications which had been read.

Leave to with-  
draw the peti-  
tion.

1793.  
3d CONGRESS,  
1st Session.

## CASE VII.

## ABRAHAM TRIGG vs. FRANCIS PRESTON, of Virginia.

[In Virginia the sheriff holding the election has a discretionary power to close the poll at any time of the day, after three proclamations made, and no voters appearing. And he has the same discretionary power to adjourn in consequence of rain.

*Quere.*—Whether the presence of a part of the military force of the United States, and what acts of theirs, will vitiate an election.\*]

Francis Preston being returned as one of the members of the House from Virginia, his seat was contested by Abraham Trigg, upon whose petition the Committee of Elections, on the 17th April, 1794, made report as follows :

Report of the  
Committee of  
Elections.

“That, upon examining the evidence in this case, it appears that in the county of Lee, in the said State, the poll was closed, after due proclamation by the sheriff, at or about three o'clock P. M. : that application was afterwards made to the sheriff to open the poll for several voters who appeared, which the sheriff refused. On recurring to the election law of Virginia, the sheriff appears to be vested with discretionary power to close the poll at any time of the day after three proclamations made, and no voters appearing. The committee are, therefore, of opinion that the election was conducted according to law in the said county.

“It appears that the sheriff of Washington county, in consequence of rain, adjourned the poll to the second day; and that, from the latitude of discretion vested in him by law, he was fully authorized so to do.

“No evidence having been produced in support of the charge that persons were polled in Washington county who live in the territory south of the Ohio, and in Kentucky, the petitioner has abandoned that charge.

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\* In the House of Representatives 13th February, 1800, on motion,

“Resolved, That a committee be appointed to prepare and report a bill containing such legislative provisions as may be judged expedient, either for removing any military force of the United States from the places of holding elections, or for preventing the interference of any such force with said elections; and that Mr. MARSHALL, Mr. LEIB, and Mr. OTIS, do prepare and bring in the same.”

FEBRUARY 18.—Mr. MARSHALL, from the committee appointed, presented, according to order, a bill for removing any military force of the United States from the places of holding elections; which was received, and read the first time.

On motion, the said bill was read a second time, and ordered to be committed to a Committee of the Whole House on Thursday next.

[See Journal, vol. 3, pp. 591, 593.]

MARCH 13.—The bill, with some amendments, was ordered to be engrossed, and on the 14th it was passed, and sent to the Senate. On the 4th of April, the Senate reported their disagreement to it, and there were no further proceedings on the bill.

“The evidence, with regard to Montgomery county, being very voluminous, and in some respects contradictory, the committee have found some difficulty in forming an opinion in relation to that county. The following facts, however, appear to be well established, viz.

1793.  
3d Congress,  
1st Session.  
Report of committee, & statement of facts.

“That Capt. William Preston, brother, and agent at the election, of the sitting member, was quartered near Montgomery court-house with about 60 or 70 federal troops, of which he had the command. That, on the day of election, the said troops were marched, in a body, twice or three times round the court-house, and paraded in front of and close to the door thereof. That, towards the close of the election, the said troops were polled generally in favor of the sitting member; but their votes were put down on a separate paper, and, after the election, at the comparison of the polls of the respective counties, were rejected by the returning officers. That some of them threatened to beat any person who should vote in favor of the petitioner. That one of the soldiers struck and knocked down a magistrate who was attending at the said election. That three soldiers stood at the door of the court-house, and refused to admit a voter because he declared he would vote for the petitioner. That many of the country people were dissatisfied with the conduct of the soldiers, which produced altercations at the election between the soldiers and the country people, the former being generally for the sitting member, and the latter for the petitioner, and terminated in a violent affray between them after the poll was closed. That some of the soldiers being afterwards interrogated why they said they would beat any man who voted for Trigg, replied, “they who are bound must obey.” That, though it is doubtful whether any of the soldiers were armed at the court-house, yet it appears that at the time of the affray, after the election, Capt. Preston had a sword and dagger; and that, when the soldiers, being overpowered by the country people, retreated to their barracks, some guns were fired by the soldiers towards the country people.

United States troops were quartered near the place of election, and are alleged to have exerted an undue influence upon it.

“The committee, on full consideration of all the evidence in relation to Montgomery county, from which the foregoing facts result, are of opinion that, notwithstanding the soldiers were not disfranchised of the right of voting, merely as such, yet their conduct, as well as that of their commander, was inconsistent with that freedom and fairness which ought to prevail at elections; and that although it does not appear, from any other than hearsay testimony, that any voter was actually prevented from voting, yet there is every reasonable ground to believe that some were, and that the election was unduly and unfairly biassed by the turbulent and menacing conduct of the military; and that the petitioner, who only lost his election by a majority of ten votes, has not had that fair opportunity of obtaining the suffrages of the people of



1793.  
3d CONGRESS,  
1st Session.

Opinion of the  
committee that  
the sitting mem-  
ber was not du-  
ly elected.

that district to which every candidate is entitled. The committee, therefore, viewing the precedent as a dangerous one, and considering the inestimable privilege of free suffrage ought never to be violated by any military interposition; that the sitting member may have obtained a majority by improper influence, and that the petitioner ought to have a chance of obtaining a seat on equal terms, are of opinion that Francis Preston is not duly elected a member of this House."

In support of the reasoning and conclusion of this report, the petitioner submitted a paper containing, at great length, his observations on the depositions and other exhibits connected with this case.

The report being before the House for consideration, a debate arose thereon, which was sustained for three days: such speeches as were reported are subjoined.

Speech of Mr.  
Smith.

Mr. SMITH, of South Carolina, said that he considered it a very clear point that the election was not a fair one, because it was evident that the petitioner had not enjoyed an equally fair chance with the sitting member. It was true that some facts in the petition had not been substantiated, but many had. The House had been told that hearsay testimony was unworthy of attention, but he wished to remind them that they were not, like a court of law, restricted to proceed upon regular proof, and not to go beyond the letter of it: they were entitled to hear and weigh every thing advanced, and to form their opinion from the general conviction arising upon the whole circumstances. Some facts, of the most unwarrantable kind, had come out. Three of Capt. Preston's soldiers guarded the door of the court-house, where the election was held: when a person, since examined as an evidence, wanted to go in, they stopped him with this question, "are you to vote for Trigg?" Upon answering yes, they replied "by Jesus, then, you shall not!" and though he was fifty-eight years of age, two of them laid hold upon him and cast him to the ground: when he got up again, he went off. Mr. SMITH said there was a clear collusion between Capt. Preston and the soldiery. [Here Mr. PRESTON interrupted him by declaring that there was no such thing in the evidence. Mr. S. affirmed that there was. The Clerk was then directed to read part of the examination of the witnesses. The particulars above stated appeared in proof.] And Mr. S. insisted that they contained a demonstration of the collusive measures between the sitting member, and his brother, Capt. Preston, and the military. It was objected to, said Mr. S., on the part of the soldiers, that they only said that they *could*, not that they *would*, knock down Mr. Trigg's voters. But Mr. S. considered this critical distinction as minute and trifling from the lips of a soldier in liquor. He did not understand its accuracy, and he imagined that his own nerves must have been as much

Debate in the  
House upon the  
preceding re-  
port.



affected by the ~~could~~ as the ~~would~~. Many of the country people had expressed much dissatisfaction with the soldiers. It was proved that when the fray began, Capt. Preston had wished to have twenty of his soldiers there; and this hint was no sooner given than a person ran off, and immediately returned with a party of them.

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1st Session.

Mr. SHERBURN was for supporting the sitting member. He wished that the time of the House might not be squandered in a useless display of eloquence; it was, to be sure, agreeable to the speaker himself, but at the same time very superfluous in regard to his audience.

Remarks of Mr. Sherburne.

The Clerk was again ordered to read some passages in the proof as far as they respected the behavior of Capt. Preston.

Mr. W. SMITH then rose a second time. As a member of the committee that had been chosen upon this business, he was entitled to vindicate their report, of which he read some extracts very unfavorable to the behavior of the soldiers.

Remarks of Mr. W. Smith.

Mr. SMITH observed that Mr. Preston, in his defence, had been extremely profuse of his censure on the committee for doing what they considered to be their duty. Mr. SMITH, referring to the observations of Mr. SHERBURN, said that he was perfectly in order for defending the report of the committee, because it was justified by the facts.

Though the quarrel between the soldiers and the country people did not happen till after the poll, yet it was from bad blood before the poll began, and therefore a reference to it was strictly in order. Mr. S. said it was no part of his intention to injure the character of Capt. Preston, who, when the tumult began, took off his sword and gave it to some person to hold. For this moderation Capt. Preston deserved credit; but still Mr. S. considered himself justified in opposing the election, since it was not conducted with that fairness, that regularity, and that equality of chances, requisite upon republican principles. He read a quotation from Blackstone as to elections. "Violent interposition," says that writer, "what is it but to cut Government up by the roots, and poison the foundations of public security?" He dwelt at some length on this idea, and the peculiar impropriety of military interposition. He said that, upon the whole, Mr. Preston had only a majority of ten votes, and when the circumstance of sixty or seventy soldiers driving off the voters of Mr. Trigg was opposed to such a narrow majority, could any body call the transaction legal? [At the words "ten votes," Mr. S. was twice interrupted, first by Mr. MACON, and then by Mr. SMITH, of Maryland, but he persisted in his assertion.] He had stated facts; the premises were obvious. Shall the House suffer an officer, the brother of a candidate, to seize the door of the court-house, and turn away the voters against his brother? It had been

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1st Session.

Remarks of  
Mr. Smith, of  
Maryland.

said that it was customary for a candidate in that part of the country to collect his friends and block up doors, but surely it was an improper custom. The sitting member had said that if his brother had taken any wrong course, he should have been prosecuted in a court of law. Mr. S. did not mean to say that Capt. Preston had committed any offence worthy of that; he did not, perhaps, imagine that he was doing wrong at all. It had been asked if it was possible that sixty or seventy soldiers could overawe two or three hundred people. He thought it possible.

Mr. SMITH, of Maryland, defended Mr. Preston. He said, that in forming an impartial judgment on this question, various circumstances must be taken into consideration besides the facts in evidence before the House. In the elections in the Eastern States, the citizens met in small bodies, and they conducted the business with that order and decency which became the true republican character; but it was the misfortune of the Southern States that their citizens assembled in large bodies; the electors of a county meet altogether before the sheriff, and give their votes at the same time. Hence it appears, as the matter was described by Mr. S., that an election in the Southern States is nothing but a nursery of superlative mischief. He said that he was somewhat surprised at hearing another member express so much resentment at an *election riot*. The gentleman had access to the history of a *certain election*, where the very chancellor of a court of justice bred a riot in his own court for the express purpose of serving his party. Much had been said about the enormity of knocking down a justice of the peace; and, in the report, the affair was stated as if the magistrate had been at the court-house in his official capacity. Now sir, said Mr. SMITH, in this part of it the report is not fair: the justice of the peace was not there in his official capacity, he was there *drunk*, sir, and he gave the first blow to the man who knocked him down. Mr. SMITH had, by the first accounts of this affair, been very much prejudiced against the election of the sitting member, but when he came to examine closely into the business, he declared that he had never known an election in the Southern States where there was so little mischief. He was sorry, for the honor of his part of the country, to give this account of it to the Eastern members, but, in point of common justice to Mr. Preston, they ought to be informed that a Southern election was quite a different sort of transaction from one of theirs. In the evidence before the House, it had been stated that one person had been seen at the court-house with a club under his coat. But, sir, said Mr. SMITH, I suppose that five hundred of my constituents had clubs under their coats; so that if this be a sufficient reason for putting an end to an election, the committee may begin by dissolving mine. If the committee are to break up every election where persons were

seen drunk, they will have a great deal of work upon hand, sir. In what way were elections for Southern members carried on? A man of influence came to the place of election with two or three hundred of his friends; and, to be sure, they would not, if they could help it, suffer any body on the other side to give a vote as long as they were there. It was certainly a very bad custom, and must very much surprise an Eastern member, but it was the custom, and perfectly known to be so, and therefore it was very injurious to hold up the character of Capt. Preston as a pretence for dissolving the election. The behavior of that young gentleman, when insulted, had been exemplary: in the midst of a riotous mob, he gave away his sword, that he might do no mischief in that way. This was a great instance of moderation and presence of mind. The aspersions cast upon the character of this officer, Mr. S. regarded as highly unjust, and they might, if not properly taken notice of, be extremely injurious to his hopes of advancing in the service. Capt. Preston had gone to the court-house as a private citizen, and he had a right to be there. As to the menace of the soldiers, that they *could* knock down one of Col. Trigg's voters, this was very different from asserting that they *would* do it. Were a man to have come up to Mr. S. in the street, and say "I *will* knock you down, sir," Mr. S. would be for giving the first blow; but were he only to say "I *can* knock you down, sir," the expression would be quite different. But as to the affray that fell out after the election was over, Mr. S. asserted that if the soldiers had killed all the country people, or the country people had killed all the soldiers, this had nothing to do with the merits of the election itself. And as to this quarrel, few men had the temper of this young officer, (Capt. Preston,) in ordering off his soldiers; so that, instead of the censure of that House, he deserved their praise. At his age, Mr. S. would not have ordered his men off; and as to the censure on the military, inserted in the report, he did not agree with it. It would be a very fine reason, to be sure, to vacate a seat in this House because one of the electors had been seen with a club under his coat! Mr. S. was sorry to give such a description to the Eastern members of the manners of his country, but he did so that he might hinder them from being hurt at the facts brought forward in the evidence. He concluded by reminding the House that it would be perfectly ridiculous to measure one thing by another which was perfectly opposite, or to judge of a Southern by an Eastern election.

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1st Session.

Mr. Smith, of  
Md., in favor  
of the sitting  
member.

Mr. CLARK said that three days had now been spent upon this business. *Long speeches did not alter the way in which members were to give their votes*, and they were, therefore, nothing but a loss of time; he wished for the question.

Remarks of  
Mr. Clark.

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Mr. MACON said that there was no law to hinder the militia from attending elections as well as any body else.

Mr. GILLON spoke for a few minutes. He saw no reason why another member (Mr. W. SMITH, of S. C.) should be so much hurt by the circumstance of an election riot. Referring to the speech of Mr. S. SMITH, he observed that there was a riot at the gentleman's *own election, and in his own favor*; and still worse, this riot was in a church; the riot was raised by a magistrate, who with his own hand dragged one of the opposite party out of the church. And if you want evidence of all this, said Mr. GILLON, I myself was present, and can be a witness. Mr. GILLON saw, therefore, no reason why there should be such a noise about this election, in particular, when others were just as bad, or a great deal worse.

Sitting mem-  
ber duly elect-  
ed.

After the reading of the proofs and the petitioner's written observations thereon, and after the sitting member had been fully heard in his defence, the parties retired from the bar, and the House proceeded to a decision on the case; and the question being put on the resolution reported by the Committee of Elections, to wit: "*Resolved, That Francis Preston is not duly elected a member of this House;*" it passed in the negative. The resolution in this negative form having failed, the sitting member was, by consequence, confirmed in his seat.

## THIRD CONGRESS—SECOND SESSION.

### COMMITTEE OF ELECTIONS.

Mr. DRAYTON,  
HILLHOUSE,  
DEXT,

Mr. LEE,  
MACON,  
HUNTER.

### CASE VIII.

**JAMES WHITE, a Delegate from the territory south of the Ohio river.**

[The right of the inhabitants of the territories of the United States, northwest and southwest of the Ohio river, to elect delegates to Congress, is secured by compacts and ordinances ratified by the United States.

Delegates, when duly elected, have a right to a seat in the House of Representatives, and of debating, but not voting.

The oath required of members not to be exacted of them.\*]

**TUESDAY, NOVEMBER 11, 1794.**

The Speaker laid before the House a letter from James White, enclosing the credentials of his appointment as a Representative of the territory of the United States south of the river Ohio, in the Congress of the United States; which were read, and ordered to be referred to a select committee to report thereon.

On the 14th of November, this committee made the following report:

“That, by the ordinance for the government of the territory of the United States northwest of the river Ohio, section 9, it is provided ‘that, so soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the Governor, they shall receive authority to elect Representatives to represent them in a General Assembly;’ and by the 12th section of the ordinance, ‘as soon as a Legislature shall be formed in the District, the Council and House, assembled in one room, shall have authority, by joint ballot, to elect a Delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.’ Full effect is given to this ordinance by act of Congress, August 7, 1789.

Report of the Committee of Elections, on the credentials of the Delegate and his right to a seat.

“That, by the deed of cession of the territory south of the river Ohio to the United States, in the fourth article, it is also provided ‘that the inhabitants of the said territory

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\* In practice it is usual for the delegates to be sworn, though it was decided in this case that they could not be required to take the oath exacted of members.

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2d Session.

Report of the  
committee.

shall enjoy all the privileges, benefits, and advantages, set forth in the ordinance of the late Congress for the government of the Western Territory; that is to say, Congress shall assume the government of the said territory, which they shall execute in a manner similar to that which they support in the territory west of the Ohio, and shall never bar or deprive them of any privilege which the people in the territory west of the Ohio enjoy."

"The cession, on these conditions, was accepted by act of Congress, on the 2d of April, 1790.

"By an act passed the 26th May, 1790, for the government of the territory of the United States south of the river Ohio, it is enacted, 'that the inhabitants shall enjoy all the privileges, benefits, and advantages, set forth in the ordinance of the late Congress for the government of the territory of the United States northwest of the river Ohio. And the government of the said territory south of the Ohio shall be similar to that which is now exercised in the territory northwest of the river Ohio; except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled 'An act to accept a cession of the claim of the State of North Carolina to a certain district of western territory.' The committee are of opinion that James White has been duly elected as Delegate from the territory of the United States south of the Ohio, on the terms of the foregoing acts: they, therefore, submit the following resolution:

"*Resolved*, That James White be admitted to a seat in this House as a Delegate from the territory of the United States south of the river Ohio, with a right of debating, but not of voting."

On this report, and the resolution with which it closes, the following debate took place:

*Debate on the report of the Select Committee, 17th November, 1794.*

Debate on the  
right of the  
Territories to  
be represent-  
ed.

Mr. NICHOLAS thought the question had been misunderstood. He saw no difficulty in admitting Mr. White to the possession of a seat. He regarded it only as putting an actual law into execution; neither the Senate nor the House of Representatives had it in their power to contravene this law.

Mr. SWIFT objected to complying with the report of the committee. He thought it could not be carried into execution, because it involved inconsistencies. If the object of the law referred to was to admit this person to debate, and not to vote, that was unconstitutional. He was by that law to be a member of Congress, but the House of Representatives are not Congress; and, therefore, this person may equally vote in the House of Representatives and in the Senate,



while, at the same time, he may interrupt the President consenting to a bill by giving his advice. The constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress, as a member of the House of Representatives, we may with equal propriety admit a stranger from any part of the world. We may as well admit the gallery, or a foreign minister, as this person from the territory southwest of the Ohio. At this rate we may very soon overturn the constitution. If this person has a proper title to a seat, it must be in the Senate; it cannot be in the House of Representatives, who are not delegates. The Senate, perhaps, might be called such: his election was nearer to the mode of theirs than that of this House.

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Mr. W. SMITH, of South Carolina, had no difficulty in declaring that the gentleman was fully qualified to take his seat in that House, by the terms of the express compact with the people. He was convinced that the Representatives have a right to admit those whom they regard as lawfully entitled to a seat in the House, for the purpose of debating. They may admit the Secretary of State, if they consider it expedient. If this gentleman had applied to the Senate, that body were also authorized to admit him, if they thought it lawful. Under the old constitution, he would have been a member *suâ generis*. He does not claim a right of voting, but of speaking only; and when the affairs of the South-western Territory were agitated in the Senate, he had a right, in Mr. SMITH's opinion, to speak and debate in that House also. He wished that there had been previously settled another part of this business, viz. by whom the Delegate was to be paid for his attendance: it may be a future question also whether he is to be dismissed when the galleries are cleared.

Mr. W. Smith,  
in favor of the  
Delegate.

Mr. GILES was not prepared to speak on the subject. On the score of expediency, his present opinion was that the Delegate from the southwest of the Ohio should be admitted. He had no objection to the motion of the member from Maryland, (Mr. MURRAY,) for the committee rising, but he would never consent to it for the sake of consulting the Senate. He would agree to it for the sake of further deliberation among themselves. If the House chose to consult the gallery, a resource for information which he should never wish to see adopted, they had a right to do so, or to ask advice from any other quarter, notwithstanding the assertion of the gentleman from Connecticut.

Remarks of  
Mr. Giles.

Mr. DEXTER said he thought the obstacle could be got over by a formal act of the Legislature. He was clear that the House had a right to consult, or admit to the privilege of debating, any individual whom they thought proper. They might, for instance, admit an advocate to plead in any particular case, but that was an entirely different matter from

Remarks of  
Mr. Dexter.



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3d Congress,  
2d Session.

admitting him to vote on the question before the House. Mr. DEXTER declared that he would vote against the report as it now stands, not because he thought the gentleman from the Southwestern Territory unentitled to a seat, but because he regarded an act of the whole Legislature as requisite for his introduction.

Remarks of  
Mr. W. Smith.

Mr. W. SMITH differed from Mr. DEXTER; he thought the House of Representatives was, in itself, perfectly competent to settle the point. He was determined that they ought not to consult the Senate in the matter. It would be extremely improper to let the Senate interfere. He again adverted to his former position, that the House may, if it sees proper, introduce the Secretary of State to the privilege of being consulted, or any other person who may be thought suitable. But he would never submit to yield the privileges of the House to the Executive. They ought to decide their elections on their own authority, and on no occasion send to inquire of the Senate if such an amendment ought to be admitted. Mr. SMITH considered the gentleman (Mr. White) as expressly within the present constitution. He trusted that the committee would not rise under any such idea as that of consulting the Senate; but if they at present rise, it would be merely for the sake of obtaining further information.

Remarks of  
Mr. Vans Mur-  
ray.

Mr. VANS MURRAY said, if we could have foreseen this case, I am sure we should have had a Joint Committee of Privileges from both Houses as judges. The situation of the gentleman refers to both, and therefore the Senate ought to be consulted on this head.

Remarks of  
Mr. McDowell.

Mr. McDOWELL objected that an act of the Legislature would never practically answer the purpose. The session would be next to ending before such a law could be passed. In the mean time, the interest of the people southwest of the Ohio is agitated in a question, and the Delegate is condemned to silence. The members, generally, admit in substance that he ought to be received into this House. He wished, therefore, that they would take a vote on the resolution of the select committee. He would object altogether to the proposal of the member from Maryland, for an act of the Legislature, or any consultation whatever with the Senate. Mr. McDOWELL was for admitting the member to his seat.

Remarks of  
Mr. Boudinot.

Mr. BOUDINOT observed that it was universally agreed that the old law for accepting such a member as a *Delegate of Congress* cannot be executed in its full sense. The gentleman ought, in his opinion, to go where members elected by Legislatures went, that is to say, to the Senate. There was no pretence for his admission among the Representatives of the people. If he had any right, it must be in the other House. He thought this a very important question, and that it deserved more consideration than it had yet received.

Mr. BOUNDINOR was not prepared to vote ; but if he was forced to give his voice at present, he should be for remitting the gentleman to the Senate. He thought that there should be an act of the whole Legislature, and should vote for the rising of the committee.

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2d Session.

Mr. DAYTON said that he should vote against the motion for the rising of the committee ; he was opposed to it. He agreed entirely with the report of the select committee, for receiving the Southwestern member immediately, as he had a right to a seat, founded on an original compact which gave it to him. He objected to any concurrence of the Senate being asked. As to consulting persons out of doors, the House had a right to call heads of departments to give their opinions on any particular subject if they thought proper, and he alluded to some cases where this expedient had been used.

Remarks of  
Mr. Dayton.

Mr. GILES mentioned one reason against the rising of the committee, which was, that the House had no other business before it. He then read an amendment to the resolution of the select committee, as a middle course, which would embrace the ideas of all parties.

Remarks of  
Mr. Giles.

The question was then put, " Shall the committee rise, and report progress?" and decided in the negative.

The question was then put on the resolution of the select committee. Mr. GILES again proposed his amendment, which was as follows : after the word "*debating*," in the resolution, add, " upon any question touching the rights and interests of the people in the territory southwest of the Ohio." The object was to narrow the power of the Delegate.

Mr. SMILIE thought he should be admitted to deliberate on any subject, or none at all.

Mr. GILES declared that he was very well pleased with the resolution as it originally stood. He had only suggested his amendment; that he might get the resolution through the House ; he therefore withdrew his motion.

Mr. BALDWIN did not see that the question was of much importance. When a member was permitted to speak, but forbidden to vote, his situation was no doubt infinitely higher than that of strangers in the gallery, that of an advocate allowed to plead at the bar of the House, or that of a printer who came only to take notes ; but still it was extremely short of that of a member of Congress. This would be more especially the case if his right of debating was restricted to the affairs of the Northwest and Southwest Territory. Mr. BALDWIN could see nothing in the new constitution that operated as an exclusion of the Delegate from the southwest of the Ohio. This privilege had been solemnly promised to these people upon three different occasions. When they belonged to the State of South Carolina, they sent a Representative, Mr. Sevier, to Congress ; and they separated into a new State, under the promise of this privilege. But

Remarks of  
Mr. Baldwin.

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3d Congress,  
2d Session.

Debate on re-  
quiring an oath  
from a Dele-  
gate.

now we have made a discovery that these laws cannot be put into execution. It is a great pity that we had not made this discovery sooner. Mr. B. rejected all idea of referring this matter to the Senate. When the latter had any question of that kind that concerned themselves, they would, no doubt, judge for themselves, and that just as properly as the House of Representatives. As to the pay of this gentleman, that might be an after question. He was clear that at present there existed no law which could make out that. The House may hereafter, if they see fit, pass a law respecting it. But, in the mean time, Mr. BALDWIN was satisfied that these people had a right to a Delegate, which could not be got rid of by the House.

Mr. SWIFT thought that it would be better to erect these people into a new State, and then the privilege would be of some real use to them. He was still of opinion that the constitution admits of no such Delegate as this person is intended to be. He is a new kind of character, unknown to it—a person *swi generis*. If the constitution knows any thing about him, then take him; if not, reject him. As to taking advice from the gallery, Mr. S. seemed to think that he had been misunderstood. To admit a person within the bar for the purpose of consulting him, was quite a different thing from permitting the gallery, like this person, to come and take a permanent seat among the members for the purpose of debating. Mr. S. never meant to debar the House from taking information wherever they could find it.

Mr. MURRAY was concerned that he felt compelled to vote against the resolution of the committee. He still hoped that the gentleman would have a seat, but that the Senate would be first consulted.

Mr. WINGATE moved an amendment to the resolution, by adopting these words, “to a seat in Congress as a Delegate to Congress.”

Mr. MADISON said that the resolution, as proposed by the select committee, was so properly expressed that he did not believe that it could admit of any amendment or alteration whatever. The Committee of the Whole House then divided on the resolution, when there appeared a very large majority in favor of the report as it stood, and consequently of admitting Mr. White as a Delegate.

The committee then rose, and the House adjourned.

TUESDAY, NOVEMBER 18, 1794.

On motion of Mr. DAYTON, the House took up the report of the Committee of the Whole House; and having agreed to the same, it was

*Ordered*, That a copy thereof be served on the said James White.

Mr. MADISON said that in new cases there often arose a difficulty in applying old names to new things. The proper designation of Mr. White is to found in the laws and rules of the constitution. He is not a member of Congress, therefore, and so cannot be directed to take an oath, unless he chooses to take it voluntarily.

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2d Session.

Mr. MURRAY moved that Mr. White should be required to take an oath.

Mr. W. SMITH observed that the constitution only required members and the clerk to take the oath. The gentleman was not a member; it does not even appear for what number of years he was elected. In fact, he is no more than an envoy to Congress. Instead of being called a Delegate to Congress, had he plainly been called an envoy, the difficulty would have vanished. He is not a Representative from, but an officer deputed by, the people of the Western Territory. It is very improper to call on this gentleman to take such an oath, any more than any civil officer in the State of Pennsylvania. Mr. SMITH did not consider him as coming even within the post office law, (for franking letters,) he is not entitled to pay, unless a law be passed to that end.

Of the official  
character of a  
Delegate.

Mr. GILES agreed with the gentleman who spoke last, as to the impropriety of demanding an oath of the gentleman.

Mr. DAYTON was against requiring the oath; call him what you will, said he, a member, a delegate, or, if you please, a nondescript. It would be wrong to accept his oath, even if he should offer it. He is not a member; he cannot vote, which is the essential part. It is said that he can argue, and by that means influence the votes of the House. But so also a printer may be said to argue and influence, when he comes to this House, takes notes, and prints them in the newspapers.

Mr. BOUNDWATER said that as the House had set out on a wrong principle, it was natural that in their subsequent progress they should wander further and further from the point. But as the House had now given their decision, he acquiesced in it. It was, however, a strange kind of a thing to have a gentleman here arguing, who was not bound by an oath.

A Delegate  
not required to  
take an oath as  
a member.

Several other members spoke; and on the question, Shall the Delegate take an oath as a member, it was decided in the negative—Ayes, 32; Noes, 42. [See *Philadelphia Gazette* of 18th and 19th November, 1794.]

The report and resolution were then agreed to by the House, and Mr. White took his seat as a Delegate. During the session a bill was passed allowing him pay and the privilege of franking letters as a member.

Is admitted to  
his seat.

1795.  
3d Congress,  
2d Session.

## CASE IX.

BENJAMIN EDWARDS, *of Maryland.*

[Of the credentials necessary to entitle one to take his seat as a member of the House.]

A resignation sent to the Governor of a State is good.]

JANUARY 1, 1795.

The SPEAKER laid before the House two letters, one from Uriah Forrest, one of the members for the State of Maryland, dated the 24th December, stating the election of Benjamin Edwards as a member of the House in his stead, he having resigned to the Executive of the State of Maryland; the other from John Kilty, clerk of the Council of the said State, dated the 27th December, addressed to the said Benjamin Edwards, informing him that an attested certificate of his election as a Representative for the said State, in the room of Uriah Forrest, had, by order of the Council of the said State, been transmitted to the Speaker of the House of Representatives; which letters were read, and ordered to be referred to the Committee of Elections, with instructions to withdraw, and report presently thereon.

The following newspaper report, taken from the Philadelphia Daily Advertiser, sheds some additional light upon this proceeding, and is, therefore, at the expense of a little repetition, inserted.

Debate on the  
credentials ne-  
cessary to enti-  
tle one to take  
his seat.

The SPEAKER informed the House of a letter which he had received, written by Mr. Forrest, in Maryland, to Mr. Benjamin Edwards, notifying that he had resigned his seat. Another letter from the clerk of the Executive of Maryland to Mr. Edwards, was next read. This letter informed Mr. Edwards that he had been elected in the room of Mr. Forrest, and that an attested certificate to this effect had been transmitted to the Speaker of the House of Representatives. This letter has not been received.

Mr. VANS MURRAY said that he thought the member should be admitted to take his seat immediately. He himself had been allowed to do so, though his credentials were not examined by the Committee of Elections, nor did he see his own name in the list of members till two or three weeks after he had taken his seat. He considered the present case as precisely similar.

Mr. DAYTON was of a quite opposite opinion. In the present case only two letters were produced by the present person, one from Mr. Forrest, and the other from the Executive of Maryland. If the gentleman (Mr. MURRAY) would look into

the record, he would see a wide distinction. In his own case it said that this member, "William Vans Murray," I think is his name, "*produced his credentials.*" Here nothing is produced except two letters. 1893.  
3d Session,  
2d Session.

Mr. MURRAY insisted on the resemblance of the two cases. He imagined that the member from New Jersey had mistaken his meaning.

Mr. DENT and Mr. LYMAN also spoke.

Mr. DAYTON said he had not mistaken the meaning of the gentleman from Maryland, who had wandered from the question. He produced his own case as a parallel one, and Mr. DAYTON, on the contrary, persisted to affirm that it was not so. The member had produced credentials, though they were not examined. The latter had only produced two letters, affording, indeed, a strong presumption that he was elected a member, but certainly no such proof of it as could entitle him to a seat in that House. This is the difference between the two cases, said Mr. DAYTON.

Mr. MADISON observed that there was, first, a letter from Mr. Forrest, declaring his seat vacant, and that Mr. Edwards was elected; and, second, a letter from the Executive of Maryland, to the same effect. These, he thought sufficient evidence, *prima facie*, to admit the gentleman to his seat, though not to support him in a contested election without further proof.

The letters produced by Mr. Edwards as his credentials were referred to the Committee of Elections.

On the same day Mr. DAYTON, from the Committee of Elections, made the following report:

"That it appears from a letter of the 27th December, written by direction of the Council of Maryland, signed by John Kilty, clerk of the Council, and directed to Benjamin Edwards, that an attested certificate of the election of the said Benjamin Edwards, as a Representative in the room of Uriah Forrest, had, on that day, been transmitted to the Speaker of the House of Representatives. Report of the  
Committee of  
Elections.

"That the resignation of the said Uriah Forrest satisfactorily appears from his letter of the 24th of December, directed to the Speaker of the House of Representatives.

"*Resolved*, That, in the opinion of the committee, the letters aforesaid are insufficient to establish the right of Benjamin Edwards to a seat in the House as one of the Representatives for the State of Maryland."

*Ordered*, That the report do lie on the table.

From the same newspaper authority, it appears that on the 2d of January the Speaker informed the House that he had received a letter from the Governor of Maryland, enclosing a certificate of the election of Mr. Edwards.

A question then arose whether the new member should be admitted to qualify, or whether the House should proceed to consider the report of the committee.

1793.  
3d Congress,  
2d Session.

Mr. DAYTON regarded the proposal of immediately admitting the member without considering the report, as in the highest degree indelicate and indecent. Who, said he, would be a committee to such gentlemen? Who would submit to be a committee after such treatment? The matter, however, ended in a reference of the letter of the Governor of Maryland to this committee, to whom, at the same time, their own report was recommitted; and thereupon the committee made the following additional report:

"That it appears from a certificate signed by the Governor of the State of Maryland, in Council, and under the seal of the said State, that Benjamin Edwards was duly elected to serve in the House of Representatives of the United States, in the place of Uriah Forrest, who had resigned his seat.

"That the resignation of Uriah Forrest satisfactorily appears from his letter of the 24th December, directed to the Speaker of the House of Representatives.

"Resolved, That, in the opinion of the committee, Benjamin Edwards is entitled to take a seat in this House as one of the Representatives from the State of Maryland, in the room of Uriah Forrest."

Is admitted to  
his seat.

Mr. Edwards was then qualified, and took his seat in the House.



## FOURTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. VENABLE,  
DENT,  
KITTEBA,  
SWIFT,

Mr. DEARBORN,  
HARPER,  
BLOUNT.

### CASE X.

*JOHN RICHARDS, of Pennsylvania.*

[The refusal of the Executive of a State to grant a certificate of election does not prejudice the right of one who may be entitled to a seat.

The returns of votes, though not made within the time required by the State law, are not on that account to be rejected, provided the opportunity has been allowed the State authorities to act upon them. But if they are substantially defective, unaccompanied by a list of the voters, &c. they ought to be rejected.]

In the district composed of the counties of Bucks, Northampton, and Montgomery, in the State of Pennsylvania, James Morris and John Richards were candidates for election; but the circumstances of the election were such as to make it doubtful to the mind of the Governor of the State whether either was duly elected, and he appears, therefore, to have declined deciding upon the legality of the said election. Before the meeting of Congress Mr. Morris died, and on the 10th December, 1795, the other candidate made his memorial to the House, setting forth the facts, and making his claim to a seat. The report of the committee is as follows, to wit:

*John Richards,  
of Pennsylvania,  
petitioner.*

“It appears to your committee that an election was held on the second Tuesday in October, in the year 1794, in the counties of Bucks, Northampton, and Montgomery, in the State of Pennsylvania, composing one entire district, for the purpose of electing a member to this House.

*First report of  
committee.*

“That the judges of election met at the place directed by law, on the 15th day of November, in the same year, for the purpose of estimating the votes and making their return. That, upon an estimate of all the returns that had been made within the time prescribed by law, it appeared that James Morris had the highest number of votes, viz. 1,648.

“That one of the army returns, viz. of the militia of Montgomery county, was laid before the said judges on the said 15th of November, and by them rejected, because it had been delivered to the prothonotary of the county after the

*State of the  
votes returned.*

1796.  
4th CONGRESS,  
1st Session.

Report of the  
committee.

10th day of the same month, the time prescribed by law for making such returns; by which return, John Richards had 156 votes, and James Morris 58; which number, together with those on the general return, made the votes in favor of John Richards 1,791.

“That on the said 15th day of November no returns had been made of the votes given in by the Bucks county militia; returns have been since received, by which it appears that James Morris had 91 votes.

“Whereupon your committee are of opinion that the army returns, which were not made within the time prescribed by law, ought to be rejected, and that James Morris was duly elected; but by reason of his death, since the holding of the said election, the seat is become vacant, and recommend the following resolutions:

“*Resolved*, That the seat of the said James Morris, as a member of this House, is, and the same is declared to be, vacant.

“*Resolved*, That the Speaker transmit a copy of the preceding resolution to the Executive of the State of Pennsylvania, to the end that the said Executive may issue writs of election to fill the said vacancy.”

Votes in favor of James Morris on the general return	1,648
On the return of the Montgomery militia	- 58
Do Buck's county militia	- 91
Rejected	— 149
	<u>1,791</u>

Votes in favor of John Richards on the general return	1,635
Do Montgomery county militia, rejected	156
	<u>1,791</u>

When this report was made, a desultory debate occurred thereon, of which the following is a brief summary:

Mr. SARGREAVES moved that the report of the Committee of Elections should be read a second time. This being done, the member stated that Mr. Richards had gone back to the country under an idea of acquiescing in the report. Upon this ground, he moved that the report should be approved of by the House.

Debate on the  
committee's  
first report.

Mr. HEISTER stated that he had seen a letter to Mr. Richards, informing him of sickness in his family, and that was the only cause of his immediate return to the country, as he had no design of submitting tacitly to the report.

Mr. VENABLE entered into a detail of the circumstances attending this election. He recommends that the House

should avoid precipitation. He said that the committee, in their report, had not completely decided the business.

1796.  
4th Congress,  
1st Session.

Mr. KITTERA likewise entered into a minute discussion of the circumstances attending the election.

Debate on the  
committee's  
first report.

Mr. SITGREAVES explained that he had proposed to the House to take up the report of the committee, under an impression that Mr. Richards, by leaving town, was satisfied and willing to submit to it. He withdrew his motion.

Mr. VENABLE was proceeding to the merits of the case, when he was reminded by the Speaker that there was no question before the House.

Mr. GALLATIN then moved that the report should be re-committed to the select committee, for which he gave various reasons.

Mr. SITGREAVES seconded the motion.

Mr. HARPER was for the recommitment. He observed that the arguments of Mr. Gallatin had been adopted and acted upon by the committee.

The report was, on motion, read a second time. The cause of this contested election appears to have been chiefly the absence of a great number of electors in this district of Pennsylvania upon the Western expedition.

They were, as the reader knows, authorized, by a particular law to that effect, to vote for a Representative in Congress, provided that the returns were made within a specified, legal time. The votes returned, within that time, for the deceased, Mr. Morris, were 1,648, and those for Mr. Richards, 1,635: this gave to the former a majority of 13.

Mr. SITGREAVES understood the complaint of Mr. Richards to be, that the unsound votes objected to were comprehended in the preceding numbers; whereas Mr. SITGREAVES himself, a member from the same district, and who, being on the spot at the time of the dispute, could speak with accuracy, knew that the fact was otherwise.

Mr. SWIRT said that, as the gentleman who was last up, spoke from personal knowledge, he supposed, of course, that his assertion was true; but Mr. Richards himself had said to the committee that all the unsound votes had been returned after the time prescribed by law. Perhaps he had misunderstood himself; but Mr. SWIRT thought a recommitment necessary, for the sake of explanation.

The foregoing report was, on motion,

*Ordered* to be recommitted to the same committee, without any specific instructions; and, on the 13th January, 1796, they made a further report, as follows:

"It appears to your committee that an election was held on the second Tuesday in October, 1794, in the counties of Bucks, Northampton, and Montgomery, in the State of Pennsylvania, for the purpose of electing a member to this House; that, the same day, an election was held by the

Second report  
of committee.

1796.  
4th Congress,  
1st Session.

Pennsylvania  
law directing  
the mode of  
canvassing the  
votes.

Returns of  
Montgomery  
county.

Return of  
Bucks county.

militia that had marched from the beforementioned counties, on the Western expedition, for the same purpose.

“ That the law of Pennsylvania, made for that special case, directs that the county judges of elections, instead of meeting on the 3d Tuesday of October, as formerly, should meet on the 10th day of November ; that the army election returns should be sent, by the said 10th of November, to the prothonotaries of the respective counties, and that the prothonotaries should, on that day, deliver them over to the county judges, to enable them to make their returns ; that the district judges should meet on the 15th day of November, to examine the county returns, to make an estimate of all the votes, and to return the person having the highest number, the Representative for the district.

“ That the county judges, as the law directs, met on the 10th day of November, at which time no army returns had been received, except from the militia of Northampton ; that, after the 10th, and before the 15th, the returns of the county of Montgomery were received by the prothonotary of that county, and delivered over to some of the county judges, two of whom made up a return, and certified it on the 14th to be a true return of the votes that had come to their hands.

“ That, on the 15th, the judges of the district met according to law, at which time were laid before them the last mentioned return, together with the returns of the elections held in the counties respectively, and the return of the militia of Northampton : upon which the judges reported, that, by the general return of the county elections, together with the return of the Northampton militia, James Morris had the highest number of votes, to wit, sixteen hundred and forty-eight.

“ That, by the Montgomery army return, which had been put into their hands in the manner before stated, it appeared that John Richards had one hundred and fifty-six votes, and James Morris fifty-eight ; which number, together with all the votes in favor of John Richards on the other returns, amounted to seventeen hundred and ninety-one, and in favor of James Morris to seventeen hundred and six, and that no returns had at that time come to hand from the Bucks county militia.

“ That, after the beforementioned report was made to the Governor of Pennsylvania, to wit, on the 18th day of January, 1795, certain papers were lodged with the Secretary of State, purporting to be a regimental return, made by Lieut. Col. James Hanna, of the Bucks county militia, and sundry tally papers, unaccompanied by any list of the persons' names who had voted at the said election, or any certificate of its having been examined by the county judges ; on which return it is stated that James Morris had ninety-one votes ; whereupon, the petitioner states,

"1st. That he is entitled to a seat in this House, because, upon an estimate of all the votes that appeared by the returns that were produced before the district judges on the 15th day of November, including the return of the Montgomery militia, which was defective in form only, and not in substance, he will be found to have the highest number of votes, to wit, seventeen hundred and ninety-one, and James Morris seventeen hundred and six.

1796.  
4th Congress,  
1st Session.

Ground of the  
petitioner's  
claim to a seat.

"2dly. That if both the army returns for the counties of Montgomery and Bucks are rejected, by deducting from the army returns of Northampton sixteen votes, which were given by persons unqualified to vote, and two votes for so many given by proxy, he would still have the highest number, to wit, sixteen hundred and thirty-five, and James Morris sixteen hundred and thirty; and

"3dly. By admitting both the returns of Bucks and Montgomery counties, and rejecting the number of votes given for James Morris by persons unqualified to vote, and the two given by proxy on the Northampton return, he would then also have the highest number, to wit, seventeen hundred and ninety-one, and James Morris seventeen hundred and seventy-nine.

"Upon which statement, and the evidence produced in support thereof by the petitioner, your committee are of opinion,

"1st. That the Montgomery return ought to have been received by the district judges, and estimated with the other returns, it having come to the hands of the county judges, and having been acted on by them before the 15th day of November, the time prescribed for the district judges to meet.\*

Montgomery  
return direct-  
ed to be receiv-  
ed.

"2dly. That the Bucks county return ought to be rejected as being substantially defective, having never been examined by the county judges, and being unaccompanied by a list of the names of the persons who voted; and

That of Bucks  
county reject-  
ed, being sub-  
stantially defect-  
ive.

"3dly. That sixteen votes were given at the election held by the Northampton militia, for James Morris, by persons who do not appear to stand on the tax lists of that county, and who are not within the description of such electors' sons as are permitted to vote by law without being on the tax lists; also, that two votes were given by proxy.

Votes by per-  
sons not quali-  
fied, and by  
proxy, to be  
rejected.

"Your committee therefore recommend the following resolution:

"*Resolved*, That John Richards is duly elected as one of the Representatives for the district composed of the counties of Bucks, Northampton, and Montgomery, in the State of Pennsylvania, and that the said John Richards be permitted to take his seat in this House."

\* See Spaulding vs. Mead, 9th Congress, where the returns were admitted, though not made agreeably to the State law; also Mallary vs. Merrill.

1796.  
4th CONGRESS,  
1st Session.

*Exemplification.*

James Morris, general returns and Northamp-			
ton militia	-	-	1,648
Montgomery return	-	-	58
			<u>1,706</u>
John Richards, general returns			
	-	-	1,635
Montgomery return	-	-	156
			<u>1,791</u>
James Morris, general returns			
	-	-	1,648
Deduct defective votes	-	-	18
			<u>1,630</u>
John Richards			
	-	-	<u>1,635</u>
Jas. Morris, general and Northampton returns			
			1,648
Montgomery return	-	-	58
Bucks do	-	-	91
			<u>1,797</u>
Deduct defective votes	-	-	18
			<u>1,779</u>
John Richards, general returns			
	-	-	1,635
Montgomery return	-	-	156
			<u>1,791</u>

The report of the committee, illustrated by the preceding numerical statement, being before the House for consideration, it was, after debate, *resolved*, on the 18th January, 1796, that the said John Richards was entitled to his seat in the House, and he was admitted accordingly.

John Richards,  
of Penn. is ad-  
mitted to his  
seat.

## CASE XI.

JOHN CLOPTON, of Virginia.

1796.  
4th Congress,  
1st Session.

[After deducting the illegal votes given to each candidate, the sitting member was still found to have a majority of good votes.]

John Clopton,  
of Virginia,  
contested by  
Burwell Bassett,  
Dec. 10,  
1795.

The report of the committee, made on the 18th January, 1796, sets forth, "that it appears that an election was held on the 16th day of March, 1795, in the district composed of the counties of Henrico, Hanover, New Kent, Charles City, and James City, in the State of Virginia, to elect a member to this House.

"That, upon an estimate of all the polls taken at the several elections, John Clopton had four hundred and thirty-two votes, and Burwell Bassett four hundred and twenty-two.

"That, out of the number of persons who voted for John Clopton, thirty-seven were unqualified to vote; and of those who voted for Burwell Bassett, thirty-three were also unqualified to vote.

"Whereupon, your committee are of opinion that John Clopton, who has the highest number of votes, after deducting the beforementioned defective votes from the respective polls, is entitled to a seat in this House."

Decision in fa-  
vor of the sit-  
ting member.

And in this report the House concurred.

## CASE XII.

MATTHEW LYON vs. ISRAEL SMITH, of Vermont.

[The sheriff had failed to give notice of the time and place of holding an election to two inconsiderable towns, included within an election district; but, as *fraud was not imputed*, and it did not appear, from the evidence, that the votes of all the freemen of the said towns, if duly given, could have changed the result of the election, it was therefore *held* that the want of notice to those towns was not a sufficient cause for setting aside the election.]

On the 8th of December, 1795, the petition of Matthew Lyon was presented, complaining of an undue election and return of Israel Smith, to serve as a member from the State of Vermont. By the report of the committee, made the 27th of January, 1796, it appears that the evidence established the following facts:

"That, by the law which directs the time and manner of holding elections for the purpose of choosing representatives, it was provided that the first constables in all the towns, having a right to elect, and, in their absence, the selectmen, should warn the freemen of their respective

Report of the  
Committee of  
Elections.



1796.  
4th Congress,  
1st Session.

Report of Com-  
mittee of Elec-  
tions.

Provisions of  
the election law  
of Vermont re-  
lative to the  
case, as report-  
ed by the com-  
mittee.

Notice of the  
time and place  
of election not  
duly given by  
the sheriff.

Opinion of the  
committee in  
favor of the  
sitting mem-  
ber.

towns to meet on the last Tuesday in December, 1794, for the purpose of holding an election. That, after holding such election, the presiding officer should, within six days, deliver to the respective county clerks the ballots, sealed up, together with a certificate of their number, and superscribed by them respectively.

“That the several county clerks in each district should meet on the second Thursday in January, and proceed to sort and count the votes, and to declare the person having a majority of all the votes, one of the Representatives for the said State. That, if it should be found, upon examination, that no one of the candidates had a majority of the votes, the said clerks should immediately notify the same to the chief magistrate of the State, who is, thereupon, directed to issue his warrant to all the first constables, and, in their absence, to the selectmen, of all the towns in any district where there had been a failure of choice, directing them to hold another election on the second Thursday in February, and to return the votes in the manner before directed. That, upon such second election, the person that should be found to have the highest number of votes should be declared the Representative.

“That, in conformity to the before recited provisions and directions, an election was held on the last Tuesday in December, 1794, in the several towns in the district composed of the counties of Bennington, Rutland, Addison, and part of Chittenden.

“That, upon an estimate of all the votes, it was found that a majority had not been given for any one of the candidates, and it was so notified to the chief magistrate, who, thereupon, issued his warrant to all the towns in the district, directing a second meeting for the purposes, and in the manner prescribed by law.

“That the sheriff of the county of Addison failed to deliver the said warrant to two of the towns in the said county, to wit, Kingston and Hancock; both of which had a right of suffrage, and had given their votes at the first election, amounting to twelve, in the town of Kingston, for Israel Smith, and three, in the town of Hancock, for Matthew Lyon; by which failure of the sheriff, those two towns were deprived of an opportunity of voting at the second election.

“That, upon an estimate of all the votes that were returned at the second election, it was found that Israel Smith had eighteen hundred and four, and Matthew Lyon seventeen hundred and eighty-three.

“That as it does not appear, to the satisfaction of the committee, that there was a sufficient number of freemen in those two towns to have altered the state of the election, fifteen only having voted on the first occasion, they are of opinion that Israel Smith is entitled to take his seat in this House.”

On motion of Mr. SWIRT, the House took up the report of the committee on the contested election of Israel Smith, one of the members from the State of Vermont. The report was read, which concludes thus:

1796.  
4th Congress,  
1st Session.

“That they are of opinion that Israel Smith is entitled to take his seat in this House.”

Mr. TRACY moved that the report should be recommitted. His reason for the motion was that the petitioner might have an opportunity to bring forward *legal proof*, if such was the fact, that two towns which had been deprived of an opportunity of voting, through the failure of notice on the part of the sheriff, contained a sufficient number of freemen to have changed the result of the election. It appeared that the evidence of this fact had been taken *ex parte* by the petitioner.

Motion to re-  
commit the re-  
port.  
Debate there-  
on.

This motion occasioned a long desultory conversation, in the course of which it was said that evidence had been laid before the committee, (but which had not been admitted,) that those two towns contained more than thirty persons entitled to vote. It was said that, if this was the case, the election ought to be set aside.

The reading of a great number of papers was called for. Among these were the certificates of the town clerks of Kingston and Hancock, stating the number of freemen in those towns amounting to thirty. These certificates, it was said, were sufficient and legal evidence.

It was observed by Mr. J. SMITH, that the first question to be determined appeared to him to be this: how far the omissions of an officer to notify the citizens of one or more districts ought to influence in vitiating an election.

Mr. TRACY withdrew his motion for recommitment, and moved that the report be postponed. This was agreed to, and Monday assigned.

FEBRUARY 11, 1796.

The report of the Committee of Elections was again taken into consideration.

Mr. W. SMITH observed, that a resolution ought to be proposed by the committee to this purport, that Israel Smith is entitled to his seat in the House. As the report now stands, he could not vote for it, as he conceived the reason assigned by the committee was not sufficient, viz. that there were only fifteen voters in the towns of Kingston and Hancock; whereas he thought there was sufficient evidence to show that there were more than thirty voters in those towns.

Mr. HILLHOUSE moved that the report should be recommitted, for the purpose of their instituting an inquiry, pursuant to the powers vested in them, similar to that which took place in the contested election of Gen. Wayne.

Mr. W. SMITH stated more particularly his objections to the report. He alluded to the several documents which had

1796.  
4th Congress,  
1st Session.

Report of Com-  
mittee of Elec-  
tions.

Provisions of  
the election law  
of Vermont re-  
lative to the  
case, as report-  
ed by the com-  
mittee.

Notice of the  
time and place  
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duly given by  
the sheriff.

Opinion of the  
committee in  
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“That the several county clerks in each district should meet on the second Thursday in January, and proceed to sort and count the votes, and to declare the person having a majority of all the votes, one of the Representatives for the said State. That, if it should be found, upon examination, that no one of the candidates had a majority of the votes, the said clerks should immediately notify the same to the chief magistrate of the State, who is, thereupon, directed to issue his warrant to all the first constables, and, in their absence, to the selectmen, of all the towns in any district where there had been a failure of choice, directing them to hold another election on the second Thursday in February, and to return the votes in the manner before directed. That, upon such second election, the person that should be found to have the highest number of votes should be declared the Representative.

“That, in conformity to the before recited provisions and directions, an election was held on the last Tuesday in December, 1794, in the several towns in the district composed of the counties of Bennington, Rutland, Addison, and part of Chittenden.

“That, upon an estimate of all the votes, it was found that a majority had not been given for any one of the candidates, and it was so notified to the chief magistrate, who, thereupon, issued his warrant to all the towns in the district, directing a second meeting for the purposes, and in the manner prescribed by law.

“That the sheriff of the county of Addison failed to deliver the said warrant to two of the towns in the said county, to wit, Kingston and Hancock; both of which had a right of suffrage, and had given their votes at the first election, amounting to twelve, in the town of Kingston, for Israel Smith, and three, in the town of Hancock, for Matthew Lyon; by which failure of the sheriff, those two towns were deprived of an opportunity of voting at the second election.

“That, upon an estimate of all the votes that were returned at the second election, it was found that Israel Smith had eighteen hundred and four, and Matthew Lyon seventeen hundred and eighty-three.

“That as it does not appear, to the satisfaction of the committee, that there was a sufficient number of freemen in those two towns to have altered the state of the election, fifteen only having voted on the first occasion, they are of opinion that Israel Smith is entitled to take his seat in this House.”

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1796.  
4th Congress,  
1st Session.

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Motion to re-  
commit the re-  
port.  
Debate there-  
on.

This motion occasioned a long desultory conversation, in the course of which it was said that evidence had been laid before the committee, (but which had not been admitted,) that those two towns contained more than thirty persons entitled to vote. It was said that, if this was the case, the election ought to be set aside.

The reading of a great number of papers was called for. Among these were the certificates of the town clerks of Kingston and Hancock, stating the number of freemen in those towns amounting to thirty. These certificates, it was said, were sufficient and legal evidence.

It was observed by Mr. J. SMITH, that the first question to be determined appeared to him to be this: how far the omissions of an officer to notify the citizens of one or more districts ought to influence in vitiating an election.

Mr. TRACY withdrew his motion for recommitment, and moved that the report be postponed. This was agreed to, and Monday assigned.

FEBRUARY 11, 1796.

The report of the Committee of Elections was again taken into consideration.

Mr. W. SMITH observed, that a resolution ought to be proposed by the committee to this purport, that Israel Smith is entitled to his seat in the House. As the report now stands, he could not vote for it, as he conceived the reason assigned by the committee was not sufficient, viz. that there were only fifteen voters in the towns of Kingston and Hancock; whereas he thought there was sufficient evidence to show that there were more than thirty voters in those towns.

Mr. HILLHOUSE moved that the report should be recommitted, for the purpose of their instituting an inquiry, pursuant to the powers vested in them, similar to that which took place in the contested election of Gen. Wayne.

Mr. W. SMITH stated more particularly his objections to the report. He alluded to the several documents which had

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Debate on the  
committee's re-  
port.

thought the gentleman in this was inconsistent with himself. Mr. SWANWICK then entered into a general review of the business. He said the object of the motion involved an endless series of process. Congress, according to this plan, must send to all parts of the Union to collect a species of evidence which, when received, may not supersede the necessity of a similar process. Should the House employ a balloon for the purpose, it would not answer, for the returns would not be received in season to settle the disputes. Mr. SWANWICK, referring to the observations which had fallen from the gentlemen from Vermont, said he thought their arguments conclusive.

Mr. N. SMITH said he wondered at the sitting member's opposing the recommitment on account of delay: he saw no difficulty that would result from delay: the sitting member will continue in possession of his seat. It is said, no further delay is wished for by the petitioner; but have not the committee excluded all his testimony? Has he any now before them? And is it right to say that he will not produce any? He thought the petitioner ought to have an opportunity of coming forward with testimony: common justice requires this.

Adverting to the question relative to the failure of notifications, Mr. SMITH observed, that, in all cases of this kind, the whole state of the polls ought to be taken into consideration. In case the state of the votes is such that the omission to notify even ten towns would not vitiate an election, he did not conceive a necessity would exist for the inquiry proposed; but as, in the present case, a very small number of votes thrown into the other scale would alter the election, he conceived it important the time should be given to ascertain the exact number of votes in those towns which were not notified.

Nor did he consider it a volunteering business; it is but common justice to the rights of the citizen, the rights of election, and the petitioner, to institute this inquiry. Nor will the Government be put to any extraordinary expense; there will be no necessity for employing a balloon, as has been hinted at by a gentleman from Pennsylvania. If the business is postponed for a reasonable time, our journals will give the petitioner seasonable notice to come forward with his testimony; if he does not, there will be an end to the business.

Mr. GILES opposed the recommitment. The circumstance of the two towns not being notified, he did not consider a sufficient reason to vacate the seat of the sitting member. He thought it rather extraordinary that so few voters were omitted. Adverting to the remarks of Mr. BUCK, he said the circumstance alluded to by that gentleman, that no complaint on the part of the people had appeared relative to any unfair practices, was conclusive in

his mind; he should, therefore, vote against the recommitment, and in favor of the sitting member's retaining his seat.

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Mr. VENABLE gave further information in respect to the proceedings of the Committee of Elections. He said a certificate had been received from the Treasurer of Vermont, which states that Kingston and Hancock are not represented in the Legislature of the State.

Debate on motion to recommit the report.

Mr. FINDLEY was against the recommitment.

Mr. WILLIAM SMITH remarked that much stress has been laid on the circumstance that the petitioner has not come forward with legal evidence since the committee rejected the testimony he did produce, and therefore it is concluded that he has abandoned the case: but he has not been informed that there is a necessity for such further evidence. The evidence he has produced he supposed was sufficient. Mr. SMITH conceived he had not therefore a fair chance. Alluding to the principles which had been supported, he thought they involved the most dangerous consequences, and may be employed to subvert the essential rights of suffrage. He stated a case in which 500 might vote for one candidate, and 505 for another, and at the same time 1,000 voters had not voted at all in consequence of not being notified. It has been said that in such a case the election ought not to have been set aside, unless it was known how the 1,000 would have voted: this doctrine destroys the rights of elections. He then adverted to the circumstances of the case, and from these he deduced the necessity of the recommitment.

Mr. GALLATIN spoke against the recommitment.

The House adjourned without deciding on the motion.

FEBRUARY 12, 1796.

The debate was resumed, and continued through the day. The prominent parts of the debate this day, in favor of the recommitment, were, that the essential rights of elections were involved in the principle contended for, viz. that a part of a district being deprived of the opportunity, through the omission of an officer, to give in their votes, ought not to vitiate an election. It was said that this principle being once established, it would clearly follow that it would be in the power of the officer, whose duty it was to notify, by omitting to give the necessary information to particular parts of a district, to bring in just such a person as he pleases: that, by this door, the most abominable corruptions might enter, and the rights of elections be totally destroyed. That the inconveniences of holding a second election are not to be compared to those which result from this principle. It was further observed that the principle also involved a sacrifice of the rights of smaller parts of a district; it was an unequalizing principle, giving an advantage to a more numerous

Continuation of  
the debate.



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Debate on motion to recommit the report.

and powerful part of a district over the less numerous and weaker parts.

In opposition to the motion for recommitment, it was said that if a revision of this circumstance takes place, it will follow that the rights of about 30 or 40 electors, the number supposed in the two towns which had not voted, would be put in competition with those of 1,804 electors, the number which voted for the sitting member, when no evidence is produced to show that these two towns would have voted so as to alter the result. That, if a new election takes place, the probability is that a greater omission will take place, and, on the principle contended for, the whole business of representation may be defeated, as no elections in this mode of procedure may take place. The further consideration of this motion was postponed till Monday.

FEBRUARY 15, 1796.

Motion to postpone.

Mr. GILES was opposed to the motion for recommitment, but, for the purpose of more fully ascertaining the state of the facts, he was willing to agree to a postponement.

Mr. NICHOLAS moved that the business be postponed to the 15th March.

Mr. WILLIAMS said, if a postponement took place, sufficient reasons should be assigned for it. It was said it was to give the petitioner time: this mode of proceeding would not obviate the difficulty. The House should determine the principle; and if, on the determination, it should appear that the want of notice to the two towns should vitiate the election, provided there were that number of electors in the two towns, as set forth by the petitioner, then the report of the committee ought to be recommitment, and the mode pointed out for Mr. Lyon to take testimony of the facts which would be admitted by this House; otherwise, it would only be a waste of time and expense to the petitioner to put off the decision of the business.

The debate was then on motion for postponement. It was moved to extend the time to the 29th.

The motion was opposed. It was contended that the principle ought first to be determined, viz. whether the failure to notify the electors ought to vitiate an election. If this is determined in the affirmative, the report may then be postponed, and the Committee of Elections may proceed to take measures to collect legal evidence as to the state of facts relative to the number of voters in the two towns which have been omitted. The motion was opposed also by those who were against the recommitment, on the ground that the House had done all that was necessary; that the mode of hunting up evidence, *ex officio*, in the case, was a departure from republican principles, and was degrading to the dignity of the House. That sufficient time had already been spent



in the business, and that the purity of elections was no way concerned.

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The motion was supported on the ground of giving the petitioner a fair chance, which it was contended had not been given him. It has been said that the towns might have met and voted, but it was doubted whether their votes would have been received, had they so met without legal notice: the canvassers of Vermont would have rejected them. Some who were opposed to the recommitment, supported the motion for the postponement. It was said that a recommitment would be nearly the same as a rejection of the report, whereas a postponement will serve to give time to reflect on the subject, and will obviate all imputations of partiality on the House, by affording the petitioner an opportunity of bringing forward, at the time appointed, all the evidence in his power.

The motion to postpone was negatived, 52 to 36.

The motion was then to recommit the report of the Committee of Elections.

Mr. COOPER wished to know on what principle the 1,804 who voted for Mr. Smith have a right to suppress the suffrages of the people of those two towns who had voted, more than the 1,773 who voted for Mr. Lyon, had to claim their will in deciding this disputed election. Gentlemen who are against the recommitment, keep back the investigation of the question of right, and reason on the impropriety of 1,804, the number which voted for Mr. Smith, yielding to the people of two trifling towns. The light in which I view this business, said Mr. COOPER, is, that the district was nearly divided: the successful parties say our exertions ought not to be frustrated by so small a number as are in these towns. The minority say, had those towns voted, we should have been successful, and they intimate that they were deprived of their assistance by a *trick*. Whether these two towns were neglected by design or by mistake, is of little consequence; certain it is they were shut out from a right, of all others the most invaluable. It strikes me there is but one solid ground for Congress to take, which is to turn back the whole proceedings to the people, for them to proceed as they see proper. The idea that the district will lose a Representative, and thereby the right of the *many* be affected by the *few*, is erroneous, for it is better that the United States should never have a Representative from that district, than to establish the principle that the free-men of two towns are not of sufficient consequence to vacate an election, when there is no proof that their numbers were not sufficient to have made a different return; but, on the other hand, there are affidavits stating that they would have voted against the sitting member. I represent a new country, where the roads are bad, and settlements remote; yet I never knew a town neglected, or the citizens

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deprived of their suffrages, without manifest marks of corruption. I heard, with pain, a gentleman from the back parts of Pennsylvania strive to explain away what I think the natural rights of the citizens. He says that if those people did not vote, it was their own fault. Could they not have gone into the neighboring town and voted? What a flimsy napkin is here thrown over the people's rights! They are seen through it. What a trifling consideration to justify the violation of justice! Does not the law of Vermont contemplate that the election should be carried into the bosom of each town? Hath not long usage entitled the people to expect an interference of this kind in their favor? Will they depart from their law and usage? Good conscience calls for the investigation of the House as to this fact. In short, if we establish the principle contended for, I fear it will stare us in the face on some future occasion, when we shall wish to have it obliterated.

Motion to recommit negatived.

On the motion for recommitting, there appeared 47 in favor of it, and 49 against it.

Mr. GILBERT then moved to postpone the consideration of the report to the 29th day of March. This was agreed to, 49 to 44.

FEBRUARY 17, 1796.

Mr. WILLIAM LYMAN moved for a reconsideration of the order of the House for postponing the case to the 29th March. This was agreed to without any opposition.

The question was then to rescind the above order. This was also carried in the affirmative.

Report recommitting.

Mr. SMITH then moved that the House should agree to the report of the Committee of Elections. This was suspended by a motion to recommit the report; which was agreed to.

The report (which had been twice under consideration, but no conclusion come to upon it) was in the following words, viz.

Second report of the committee.

"That it appears, by the deposition of the town clerk of Hancock, that there were 17 persons in said town who were entitled to vote, 12 of whom are stated to have been admitted in that town, and 5 in other towns.

"That, by a like deposition of the clerk of Kingston, it appears that there were in that town 19 persons, 17 of whom had been qualified in that town, and 2 in other towns.

"That it does not appear that the warrants were withheld from the said towns by the sheriff, from any fraudulent intention, but that the failure was accidental as to the town of Kingston, and that the warrant was not sent to the town of Hancock, because the sheriff believed they had not voted at the first meeting."

And when the report was first under consideration, it was amended by adding a resolution, to the following effect:

“That as there appears to have been a sufficient number of qualified voters in the towns of Hancock and Kingston to have changed the state of the election, *Resolved*, That Israel Smith was not duly elected, and is not entitled to his seat in this House.”

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This report occasioned considerable debate. It was defended by Messrs. HARPER, SITGREAVES, W. SMITH, and N. SMITH, principally on there being votes sufficient in the above two towns to have changed the election, if they had voted for the petitioner, and on the necessity of establishing it as a principle in elections that every town should have notice of an election.

Debate on the  
second report  
of the commit-  
tee.

It was opposed by Messrs. VENABLE, (the chairman of the Committee of Elections,) GALLATIN, NICHOLAS, GILES, W. LYMAN, and FINDLEY. They admitted the possibility, but denied the probability, that 36 votes in these two towns would have changed the fate of the election. They said there was every reason to believe the contrary: that Mr. Smith had a majority of *twenty-one* votes: that *fifteen* of the voters in Hancock and Kingston had voted for Mr. Smith at the former election: that Mr. Lyon, with all his endeavors to procure them, had only brought forward a petition from twenty of these persons, who declared they would have voted for him; which, if they had done, and none had voted for Mr. Smith, he still would have had a majority of one vote; but there were affidavits from seven of these voters, declaring they would have voted for the sitting member: seven others refused to take any part in the dispute, and two of the voters were absent at the time of the election, and could not have voted either way.

The vote was at length taken on the motion of Mr. WILLIAM SMITH, by yeas and nays, as follows:

YEAS.—Messrs. Bourne, Coit, Dent, Earl, A. Foster, D. Foster, Gilbert, Glum, Goodrich, Griswold, Harper, Hindman, Kitchell, Locke, S. Lyman, Read, Sitgreaves, Jeremiah Smith, N. Smith, Isaac Smith, W. Smith, Swift, Thatcher, Thompson, Thomas, Tracey, Van Allen, Wadsworth—28.

NAYS.—Messrs. Bailey, Baldwin, Baird, Benton, Blount, Bryan, Burgess, Christie, Claiborne, Coles, Findley, Gallatin, Giles, Gillespie, Gilman, Greenup, Hampton, Hancock, Hathorn, Havens, Heath, Hiester, Holland, Jackson, W. Lyman, Maclay, Macon, Madison, Milledge, Moore, Muhlenberg, New, Preston, Richards, Rutherford, R. Sprigg, jr., T. Sprigg, Swanwick, Tatem, Van Courtland, Venable—41.

The question being thus decided in favor of the sitting member, Mr. W. LYMAN proposed the following resolution; which was adopted.

“*Resolved*, That ISRAEL SMITH is entitled to a seat in this House as one of the Representatives from the State of Vermont.”

Sitting member  
declared enti-  
tled to his seat.

1795.  
4th Congress,  
1st Session.

## CASE XIII.

JOHN SWANWICK, *of Pennsylvania.*

John Swanwick  
of Pa. contest-  
ed by sundry  
citizens.  
17 Dec. 1795.

The petition of sundry citizens and electors, of Philadelphia, was presented, complaining of the undue election of John Swanwick.

The journal and recorded documents do not exhibit the nature of the allegations, but the result of the case rendered a knowledge of them very immaterial.

Allegations  
abandoned.

The report of the committee, which was concurred in by the House, was in the following words: "That the petitioners have entirely failed to support the allegations contained in their petition, and that they have, in a formal manner, relinquished the same. Your committee are therefore of opinion that John Swanwick is entitled to a seat in this House."

## CASE XIV.

JOSEPH B. VARNUM, *of Massachusetts.*

[The allegation that votes were given by proxy, that is, from persons not present at the polls, but from those who pretended to act for them, is sufficiently certain, without setting forth the names of such persons.

The allegation that votes were given by persons *not qualified to vote*, is defective, unless it show the names of such persons.]

The memorial of sundry citizens of Massachusetts was presented, contesting the right of Joseph B. Varnum to his seat.

MARCH 15, 1796.

The committee reported that they had proceeded to examine the petitions, and the documents which accompany them. They have also received from Aaron Brown, a petitioner, a paper purporting to be a specification of the facts relied on to support the charge, and praying for a general power to take evidence in support thereof, which is as follows:

*A statement of facts to be proved by the petitioners.*

Charges against  
the sitting mem-  
ber.

"1st. That one hundred and eighty-five votes were returned by the selectmen of Dracut, and counted by the Governor and Council.

"2d. That, of those, sixty were illegal and bad, fifty-five ballots or votes being received and certified by the selectmen or presiding officers, of whom Joseph Bradley Varnum, Esq. was one, which were given by proxy; that is, from persons who were not present at the meeting, but from other persons who pretended to act for them: and five

votes were received and certified by the said presiding officers, which were given by persons by law not qualified to vote at said meeting.

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**6th Congress,**  
**1st Session.**

“3d. If Mr. Varnum does propose to examine the proceedings at the meetings of any other towns in the district, the petitioners wish to reserve liberty of showing that votes given for Mr. Varnum in any other town in the district were illegal.”

**AARON BROWN,**  
*for the petitioners.*

To this statement was appended the following, also signed by him as an explanation of the above specification :

“The petitioners expect to prove that the above sixty illegal votes were received by the selectmen, by showing that the whole number of legal voters was not more than two hundred and twenty-five ; of which number one hundred did not attend the meeting on the twenty-third day of March last ; and a part of those that did attend and vote, were not legally qualified to vote.” Also the objections of the sitting member, and a requisition that the petitioners be held to a specification of the names of the persons objected to, and the objection to each, a notification thereof to the sitting member before he should be compelled to take evidence concerning the matters alleged, or make any answer thereto.

Notice of proof intended to be offered.

Objections to the petition, by the sitting member.

“Upon all which, as well from the difficulty of the case, as from a desire to have uniformity in proceedings of this kind, your committee have been induced to pray the instructions of this House as to the kind of specification that shall be demanded of the petitioners, and the manner in which the evidence shall be taken.”

The committee ask instructions from the House.

This report was committed to a Committee of the Whole House, and, after several days' discussion, the following resolutions were reported, and agreed to by the House :

“*Resolved*, That the allegation of Aaron Brown, agent for the petitioners, as to fifty-five votes given by proxy, is sufficiently certain.

Instructions by the House.

“*Resolved*, That the allegation of the said Aaron Brown, as to persons not qualified to vote, is not sufficiently certain ; and that the names of the persons objected to, for want of sufficient qualifications, ought to be set forth prior to the taking of the testimony.”

Mr. SEDGWICK offered the following resolution, to wit :

“*Resolved*, That the Committee of Elections be instructed to prescribe an efficient mode whereby evidence may be taken relative to the facts set forth in the said petitions and specifications of Aaron Brown, agent for said petitioners.”

This resolution was amply debated. The principal arguments used in support of it, were, that the facts stated in

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Sitting mem-  
ber entitled to  
his seat.

*to deprive him of his seat was rather the effect of malevo-  
lence, than a desire to promote the public good."*

When this report was before the House for consideration, a motion was made, and carried, to strike out the words in *italics*, and in lieu thereof to insert the following:

"And that the charges contained in the said petitions against the sitting member are wholly unfounded; and that the conduct of the sitting member appears to have been fair and unexceptionable throughout the whole transaction." And the report, so amended, was agreed to by the House, 26th January, 1797.

## CASE XV.

### DAVID BARD, of Pennsylvania.

[The election law of Pennsylvania directs that the judges should meet on a certain day in October, and, in certain cases, in November; estimate the votes given, and make due return of the person having the highest number of votes. In this case, the return was omitted at the times prescribed, and subsequently made in the month of May. *Held* that this irregularity did not vitiate the election or return.

Where the final return is informal, it seems that the committee may call for the county or primary returns, and from them make an estimate of the votes, as the judges themselves might have done.]

The report which discloses the facts of this case, appears to be the result of an *ex officio* investigation of the credentials of David Bard, a member from Pennsylvania, by the Standing Committee of Elections, and is as follows:

MARCH 18, 1796.

Report of Com-  
mittee of Elec-  
tions.

"That the elections appear to have been regularly held in the several counties composing the district, and that the judges of the several districts in the respective counties made up a return for each of the said counties, in the manner and at the time prescribed by law.

"That the general election law directs that one of the judges of each of the counties composing the district should meet at a place called the Burnt Cabins, in the county of Bedford, on the third Tuesday in October ensuing the election, to estimate the votes given in the several counties, and to return the person having the highest number of votes in the entire district, as their Representative; except there should be, at the time of holding the said elections, any of the militia of any of the said counties in the service of the United States; and, in that case, that the judges should meet the 15th of November ensuing the election.

“ That, at the time of holding the elections, Bedford and Huntington, two of the counties in the said district, had no part of their militia in the service of the United States ; and the judges of those two counties met at the Burnt Cabins on the third Tuesday in October, in order to make their district return.

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1st Session.

“ That the county of Franklin had a part of their militia in the service of the United States at that time, and the judge from that county did not meet the other judges, in consequence of which no return was made on that day.

“ That, on the 15th of November, the judges of Bedford and Franklin met for the purpose of making a return ; but the judge of Huntington, as it is suggested, not being informed of the alteration of the law in that respect, failed to attend, by which they were again prevented from making a return : that, on the 1st day of May last, all the judges met at the Burnt Cabins, and returned David Bard as having the highest number of votes.

“ That, in consequence of the informality of the said return, it being the 1st of May, instead of the 15th of November, the committee have called for and obtained the several county returns, on which the district return was founded, and have made an estimate of the votes, as they appear from those returns ; which estimate is as follows :

“ David Bard, eighteen hundred and eight.

“ James McClain, one thousand and ninety.

“ James Chambers, five hundred and nineteen.

“ Whereupon, your committee are of opinion that David Bard is entitled to his seat in this House.”

Declared entitled to his seat.

And, on the question, Will the House agree to this report ? it passed in the affirmative.



## SEVENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. MILLEDOR,  
TENNEY,  
CONDIT,  
DENNIS,

Mr. HANNA,  
STANLEY,  
TALIAFERRO.

### CASE XVII.

**NARSWORTHY HUNTER, *Delegate from Mississippi Territory.***

[By the acts and ordinances of Congress, the Mississippi Territory is entitled to elect a Delegate to Congress. Such Delegate to have the right of debating, but not of voting in the House. See the case of James White, at the 1st session of the 3d Congress, *ante*, p. 85.]

On the 8th of December, 1801, it was, by the House,  
“*Ordered*, That the credentials of Narsworthy Hunter, who has appeared as a Delegate from the Territory of the United States known by the name of the Mississippi Territory, be referred to the Committee of Elections, and that they be directed to report whether the Territory is entitled to elect a Delegate who may have a seat in this House.”

Upon this reference the committee, on the 16th December, 1801, made the following report, to wit:

Report of the  
Committee of  
Elections.

“That, by an ordinance of Congress of the 13th July, 1787, for the Government of the territory of the United States northwest of the Ohio, it is ordained that so soon as a Legislature shall be formed in the district, the Council and House assembled shall have authority, by join ballot, to elect a Delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during the temporary Government thereby erected.

“That, by an act of Congress passed the 7th April, 1798, entitled ‘An act for an amicable settlement of limits within the State of Georgia, and authorizing the establishment of a Government in the Mississippi Territory,’ it is, by the third section thereof, enacted, that the tract of country bounded as therein described shall be constituted one district, to be called the Mississippi Territory, and the President is thereby authorized to establish a Government therein, similar to that exercised in the territory northwest of the Ohio: And, by the sixth section thereof, it is further enacted, that, from and after the establishment of the said Government, the people of said Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages granted to the people of the territory northwest of the Ohio, in and by the

ordinance of the 13th July, 1787, in as full and ample a manner as the same are possessed and enjoyed by the people of the Northwestern Territory.

1801.  
7th Congress,  
1st Session.

"That, by the act of Congress passed the 10th of May, 1800, entitled 'An act supplemental to the act entitled An act for an amicable settlement of limits with the State of Georgia, and authorizing the establishment of a Government in the Mississippi Territory,' it is, in the first section thereof, enacted, 'that so much of the ordinance of Congress of the 13th July, 1787, and the act of Congress of the 7th August, 1789, providing for the Government of the territory of the United States northwest of the Ohio, as relates to the organization of a General Assembly therein, and prescribes the powers thereof, shall forthwith operate and be in force in the Mississippi Territory.'

Report of the  
committee.

"From which ordinances and acts your committee are of opinion, and do report, that the Mississippi Territory is entitled to elect a Delegate to Congress, with the right to debate, but not to vote.

"Your committee further report, that, from an examination of the credentials of Narsworthy Hunter, it is the opinion of your committee that the said Narsworthy Hunter is duly elected by the General Assembly of the Mississippi Territory as a Delegate to the seventh Congress of the United States."

This report was committed to a Committee of the Whole House, and on the 21st December was therein amended, as follows:

"*Resolved*, That the Mississippi Territory is entitled to elect a Delegate to Congress, with a right to debate, but not to vote."

Your committee further report, that, from an examination of the credentials of Narsworthy Hunter, it is the opinion of your committee that the said Narsworthy Hunter is duly elected by the General Assembly of the Mississippi Territory a Delegate in the seventh Congress of the United States.

Mr. Hunter en-  
titled to his  
seat.

The resolution as reported was agreed to by the House. Yeas, 77; Nays, 8.

*Ordered*, That the residue of said report of the Committee of the Whole House do lie on the table.

*Note*.—Mr. Hunter had taken his seat on the 7th.

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4th Congress,  
1st Session.

Report of Com-  
mittee of Elec-  
tions.

Provisions of  
the election law  
of Vermont re-  
lative to the  
case, as report-  
ed by the com-  
mittee.

Notice of the  
time and place  
of election not  
duly given by  
the sheriff.

Opinion of the  
committee in  
favor of the  
sitting mem-  
ber.

towns to meet on the last Tuesday in December, 1794, for the purpose of holding an election. That, after holding such election, the presiding officer should, within six days, deliver to the respective county clerks the ballots, sealed up, together with a certificate of their number, and superscribed by them respectively.

“That the several county clerks in each district should meet on the second Thursday in January, and proceed to sort and count the votes, and to declare the person having a majority of all the votes, one of the Representatives for the said State. That, if it should be found, upon examination, that no one of the candidates had a majority of the votes, the said clerks should immediately notify the same to the chief magistrate of the State, who is, thereupon, directed to issue his warrant to all the first constables, and, in their absence, to the selectmen, of all the towns in any district where there had been a failure of choice, directing them to hold another election on the second Thursday in February, and to return the votes in the manner before directed. That, upon such second election, the person that should be found to have the highest number of votes should be declared the Representative.

“That, in conformity to the before recited provisions and directions, an election was held on the last Tuesday in December, 1794, in the several towns in the district composed of the counties of Bennington, Rutland, Addison, and part of Chittenden.

“That, upon an estimate of all the votes, it was found that a majority had not been given for any one of the candidates, and it was so notified to the chief magistrate, who, thereupon, issued his warrant to all the towns in the district, directing a second meeting for the purposes, and in the manner prescribed by law.

“That the sheriff of the county of Addison failed to deliver the said warrant to two of the towns in the said county, to wit, Kingston and Hancock; both of which had a right of suffrage, and had given their votes at the first election, amounting to twelve, in the town of Kingston, for Israel Smith, and three, in the town of Hancock, for Matthew Lyon; by which failure of the sheriff, those two towns were deprived of an opportunity of voting at the second election.

“That, upon an estimate of all the votes that were returned at the second election, it was found that Israel Smith had eighteen hundred and four, and Matthew Lyon seventeen hundred and eighty-three.

“That as it does not appear, to the satisfaction of the committee, that there was a sufficient number of freemen in those two towns to have altered the state of the election, fifteen only having voted on the first occasion, they are of opinion that Israel Smith is entitled to take his seat in this House.”

On motion of Mr. SWIRT, the House took up the report of the committee on the contested election of Israel Smith, one of the members from the State of Vermont. The report was read, which concludes thus: 1796.  
4th Convention,  
1st Session.

“That they are of opinion that Israel Smith is entitled to take his seat in this House.”

Mr. TRACY moved that the report should be recommitted. His reason for the motion was that the petitioner might have an opportunity to bring forward *legal proof*, if such was the fact, that two towns which had been deprived of an opportunity of voting, through the failure of notice on the part of the sheriff, contained a sufficient number of freemen to have changed the result of the election. It appeared that the evidence of this fact had been taken *ex parte* by the petitioner. Motion to re-  
commit the re-  
port.  
Debate there-  
on.

This motion occasioned a long desultory conversation, in the course of which it was said that evidence had been laid before the committee, (but which had not been admitted,) that those two towns contained more than thirty persons entitled to vote. It was said that, if this was the case, the election ought to be set aside.

The reading of a great number of papers was called for. Among these were the certificates of the town clerks of Kingston and Hancock, stating the number of freemen in those towns amounting to thirty. These certificates, it was said, were sufficient and legal evidence.

It was observed by Mr. J. SMITH, that the first question to be determined appeared to him to be this: how far the omissions of an officer to notify the citizens of one or more districts ought to influence in vitiating an election.

Mr. TRACY withdrew his motion for recommitment, and moved that the report be postponed. This was agreed to, and Monday assigned.

FEBRUARY 11, 1796.

The report of the Committee of Elections was again taken into consideration.

Mr. W. SMITH observed, that a resolution ought to be proposed by the committee to this purport, that Israel Smith is entitled to his seat in the House. As the report now stands, he could not vote for it, as he conceived the reason assigned by the committee was not sufficient, viz. that there were only fifteen voters in the towns of Kingston and Hancock; whereas he thought there was sufficient evidence to show that there were more than thirty voters in those towns.

Mr. HILLHOUSE moved that the report should be recommitted, for the purpose of their instituting an inquiry, pursuant to the powers vested in them, similar to that which took place in the contested election of Gen. Wayne.

Mr. W. SMITH stated more particularly his objections to the report. He alluded to the several documents which had

## SEVENTH CONGRESS—SECOND SESSION.

### COMMITTEE OF ELECTIONS.

Mr. BACON,  
TENNEY,  
CONDIT,  
DENNIS,

Mr. ELMER,  
STANLEY,  
NEW.

### CASE XVIII.

JOHN P. VAN NESS, of New York.

[The acceptance by a member of *any* office under the United States, after he has been elected to, and taken his seat in Congress, operates as a forfeiture of his seat.

As to the effect of *holding* after election, and before taking the seat, see the case of Hammond vs. Herrick, *post.*]

The inquiry in this case into the right of the sitting member to hold his seat, arose simply on the motion of a member, and without the presentation of any petition or memorial.

DECEMBER 27, 1802.

Mr. DAVIS, of Kentucky, observed that he was of opinion that a member of the House retained his seat contrary to the spirit and sense of the constitution ; it therefore became his duty to offer a resolution for instituting an inquiry into the subject, in doing which, he disclaimed all personal view. He then made the following motion :

Committee to inquire if he has forfeited his seat.

“ *Resolved*, That the Committee of Elections be, and they are hereby, instructed to inquire whether John P. Van Ness, one of the members of this House from the State of New York, returned by said State to serve as one of its members in the seventh Congress of the United States, has not since his election as a member of this House, and since he occupied a seat as a member, accepted of, and exercised the office of a major of militia, under the authority of the United States, within the Territory of Columbia, and thereby forfeited his right to a seat as a member of this House.”

Remarks on the resolution for an inquiry.

Mr. MITCHELL, of New York, considered the point interesting in two relations ; that which involved the decision of a principle, and that which went to deprive the State (New York) of one of her members. For these reasons he hoped the business would not be immediately pressed. He acknowledged that this was not the first intimation he had received of the contemplation of such a motion ; but he had

entertained a hope that the gentleman with whom it originated, had, on reflection, considered it not inconsistent with his duty to abandon it.

1802.  
7th Congress,  
2d Session.

Mr. DAVIS replied that he felt no disposition to press a decision. He had communicated, the first day he took his seat, his ideas on the subject to certain members, the friends of the gentleman implicated by the resolution, in hopes that he would resign. He now entertained no wish to push the business. He supposed, however, that the resolution would go to the Committee of Elections. He repeated that he was governed by no personal prejudice, but entirely by a sense of duty. He concluded with saying he was in favor of the question of reference being immediately taken. But on Mr. MITCHELL repeating his desire for some delay, Mr. DAVIS agreed to let the resolution lie till to-morrow.

On the resolution to inquire into the right of the sitting member.

DECEMBER 29, 1802.

Mr. DAVIS having called up his resolution, Mr. VAN NESS said that, so far as the decision of the House might affect him personally, he felt little concern; but so far as it affected him as a Representative of an important State, he was not so indifferent. He had no objection whatever to the proposed inquiry being made; as it involved the decision of an important principle, it deserved great attention. He had no doubt of the inquiry being made with that candor and fairness which, in most cases, characterized the proceedings of the House. He was far from imputing any impure motives to the mover or seconder of the resolution. It would be as derogatory in him to impute, as in them to entertain any views dishonorable or base. He had risen barely to state his wish that an inquiry might be made.

The resolution was then adopted without a division.

On the 11th January, 1803, the Committee of Elections made the following report:

"That, from the free concessions and agreement of the said member, it appears to your committee that he has accepted and exercised the office of a major of the militia, under the authority of the United States, within the Territory of Columbia, and that a paragraph in the sixth section of the first article of the constitution, which expressly provides that 'no person holding any office under the United States shall be a member of either House during his continuance in office,' does, in the opinion of your committee, render the acceptance and exercise of the office aforesaid incompatible with the holding at the same time of a seat in the House.

Report of the  
Committee of  
Elections.

"Your committee, therefore, ask leave to submit to the House the following resolution, to wit:

"Resolved, That John P. Van Ness, one of the members of this House, having accepted and exercised the office of

1803.  
7th Congress,  
2d Session.

major of militia, under the authority of the United States, within the Territory of Columbia, hath thereby forfeited his right to a seat as a member of this House."

JANUARY 17, 1803.

The report being under consideration in Committee of the Whole,

Speech of sitting member.

Mr. VAN NESS said he would make a remark or two that would perhaps remove any impressions of indelicacy, on his part, in retaining his seat under the circumstances in which he was placed. He considered himself as standing on that floor, not as a private individual, but as a Representative of New York, and as holding a trust which he was not authorized to abandon before a constitutional decision should be made. His constituents had placed him there as the guardian of their rights; and that trust he could not desert without a constitutional decision being made. If that decision should be adverse to his retaining his seat, in retiring from the House he should feel no regret but at leaving his constituents unrepresented during the remainder of the session, at not having discharged all the business assigned him by the Chair, and at ceasing to associate with gentlemen, who, for the most part, he respected. In a pecuniary view, the relinquishing his seat could not in the least affect him; nor should he consider it disreputable to leave a body without any imputation of dishonor or impropriety.

The reasons he should offer to the committee for retaining his seat, were few and simple. He thought the fair, liberal, and sound construction of the constitution did not affect his case; that the incapacitating provision only applied to civil offices. The constitution was only a digest of the most approved principles of the constitutions of the several States, in which the spirit of those constitutions was combined. Not one of those constitutions excluded from office those who had accepted military appointments, except in the regular service. He, therefore, felt a full conviction that it was never the intention of the framers of the constitution of the United States to exclude militia officers from holding a seat in Congress; and, however important it might be to adhere to the letter of the constitution, yet, when the spirit of it was so clear, as it appeared to him, it ought to have weight in the decision of the question before the committee, which might affect objects of great importance. The right of every portion of the Union to a representation in that House, was very important, and ought to be respected in all cases which may either directly or indirectly affect it. Gentlemen, therefore, ought to reflect before they deprive a part of the Union of this important right.

Mr. VAN NESS here read the second paragraph of the sixth section of the first article of the constitution, as follows:



"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office."

1863.  
7th Congress,  
2d Session.

Speech of the  
sitting mem-  
ber.

From the language of the first part of this paragraph, Mr. VAN NESS inferred that it was the intention of the framers of the constitution that the restriction should apply to civil officers only. Gentlemen may ask, shall we, by our construction, countenance an introduction into this House of regular military officers? But to this it may be replied, that full confidence may be placed on the good sense of the people to prevent this effect. The framers of the constitution, therefore, thought this a power that might be safely left to the discretion of the people.

The constitution only applied to two alternative cases. An individual holding a seat in this body could not be appointed to a civil office; and an individual holding a civil office could not, consequently, hold a seat here. This was all that it was necessary to provide for.

There was another ground. He could not conceive that such an office as he held was comprehended in the constitution. He was not an officer of the United States, but of a district, which, locally considered, might be looked upon as an island placed in the sea. He could not think that the constitution meant to exclude officers of dependent colonial districts. It had never been contemplated that such colonial possessions should be represented on this floor. Why, therefore, apply the exclusion to them?

One great reason for this provision of the constitution was, to prevent corruption. Where could be the danger of this from an office without the least emolument? The inconvenience of exclusion, in such cases, too, would be glaring. Its necessary effect would be an inability to get those to accept commissions in the militia who were proper for the stations.

There was another idea entitled to weight. If it be determined that the militia officers of this district shall be excluded, the same rule will apply to all militia officers appointed by the Governors of the Territories of the United States. Do you not also exclude the militia officers of the States, who, though appointed in the States, are subject to the command of the United States? A construction of the constitution, productive of such effects, he considered unsound, and contrary to the intention of its framers.

Had he supposed that the acceptance of an office in the militia would have interfered with his seat in that House, he would never have accepted it. He had never entertained a doubt on this point until broached in the House. Since then, he had heard various opinions. By what he

1803.  
7th Congress,  
2d Session.

Remarks of  
Mr. Bacon.

Remarks of  
Mr. Thomas.

had heard, his own opinion was not changed, as he believed that a true construction of the constitution would not exclude his case. Should, however, a decision against his holding his seat be made, he should retire without any other regret than that which he had expressed. He had not risen to argue the case as an advocate, but merely to assign the grounds on which he had acted.

Mr. Bacon observed that the Committee of Elections had not thought themselves at liberty to be influenced by the propriety or impropriety of this part of the constitution, otherwise they might have determined differently; but they felt themselves bound by the constitution itself. Though the first part of the section of the constitution referred to civil offices, yet the latter part used the expression *any office*, which was more comprehensive, and appeared to them to have been intended to have a universal effect.

Mr. THOMAS. Mr. Chairman, ever since this question was first agitated, I have felt no small degree of solicitude respecting it. On the one hand, I view the seat of a member of this House from the State which I have the honor to represent, important, not only as it respects the interest of that State in the deliberations of the National Legislature, but as it respects the feelings of my friend and colleague; and, on the other hand, I view the constitution of my country, which I consider the palladium of our liberties, the rock of our national salvation. But, sir, however important I may consider my colleague's holding his seat on this floor, either as it respects himself or the State of New York, if it comes in competition with that constitution, it is my duty, and I shall readily yield to it. The clause of the constitution, said Mr. T., which has been quoted by the committee, and which is in point, declares that "no person holding any office under the United States, shall be a member of either House during his continuance in office." It appears, said Mr. T., that my colleague did, some time in the recess of Congress, accept and exercise the office of a major in the militia of the District of Columbia, under an act of Congress, and the exclusive Government of the United States. This office, although trivial in itself, without emolument, and to which very little or no influence can attach, nor can it, in my opinion, have a tendency to bias his vote improperly on any question in this House; yet, as I do believe it comes within the province of that clause of the constitution, and, permitting him to retain his seat, may establish a precedent which may hereafter be attended with pernicious consequences, I conceive myself bound in justice to myself, as well as to my country, to give my vote to concur with the committee in their report.

The question was then taken on the report of the Committee of Elections; which was agreed to without a division.

The committee rose. The House immediately took up their report.

Mr. RANDOLPH observed that, on a precedent so important as was about to be established by the vote of the House, it was unnecessary to say a word. He wished, however, that the disposition of the House to exclude, by a unanimous vote, even the shadow of Executive influence, should be recorded on their journals, for which purpose he called the yeas and nays; which were taken, and were unanimously in favor of the resolution.

1802.  
7th Congress,  
2d Session.

So the seat of the said member was declared vacant.

Seat declared  
vacant.

## CASE XIX.

PAUL FEARING, *Delegate from the Northwestern Territory.*

[The erection of a Territory into a State does not necessarily vacate the seat of the Delegate.]

Mr. DAVIS said, that while on the subject of seats improperly held, he hoped another member would, by resigning, relieve the House from the necessity of deciding on his case. He questioned whether a Territorial Delegate could represent a State. He alluded to the State of Ohio. It appeared to him that a State must be represented in a full manner by Representatives entitled as well *to vote as to debate*. The gentleman, therefore, who held his seat as the Representative of the Territory, could not remain in that character after the Territory had become a State; neither could he be considered as the Representative of the State, inasmuch as he had been appointed under the Territorial Government. Mr. DAVIS concluded by giving notice that, unless the gentleman resigned, he should offer a motion to vacate his seat.\*

Remarks of Mr.  
Davis on Mr.  
F.'s right to  
hold his seat.

On motion,

• *Resolved*, That inasmuch as the late territory of the United States northwest of the river Ohio, have, by virtue of an act of Congress, passed on the 1st day of May, 1802, formed a constitution and State Government, and have thereby, and by virtue of the act of Congress aforesaid, become a separate and independent State, by the name of "Ohio," that Paul Fearing, a member of this House, who was elected by the late Territorial Government of the territory northwest of the river Ohio, is no longer entitled to a seat in this House."

"*Ordered*, That the said motion be referred to the Committee of Elections; that they do examine the matter thereof, and report the same, with their opinion thereupon, to the House."

\* See National Intelligencer of 31st December, 1802. The above remarks were at the close of some observations on the reference of the resolution in Van Ness' case.

1803.  
8th Congress,  
1st Session.

On the 31st January the committee made the following report :

That the committee have, according to order, examined the matter thereof, and report the following resolution as their opinion thereon :

Delegate is permitted to hold his seat.

“ *Resolved*, That Paul Fearing, the Delegate from the territory northwest of the river Ohio, is still entitled to a seat in this House.”

*Ordered*, That the said report do lie on the table.

*Note*.—Mr. Fearing had taken his seat at the commencement of the session, and the above report was never further acted on.

## EIGHTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
GODDARD,  
MATTHEW CLAY,  
HUET,

Mr. VARNUM,  
LIVINGSTON,  
KENNEDY.

### CASE XX.

THOMAS LEWIS, of Virginia.

[Illegal votes are to be rejected, and he who has the highest number of the remaining good votes is entitled to his seat.]

On the 14th November, 1803, the petition of Andrew Moore, of Virginia, was presented to the House, complaining of the undue election of Thomas Lewis of that State; which, together with several communications from the congressional district to the House, were referred to the Committee of Elections, who reported on the 24th February following these facts, to wit:

Report of Committee of Elections.

“ That, at an election held on three several days, in the month of April, in the year one thousand eight hundred and three, directed by the law of the State of Virginia, for a member of the House of Representatives of the United States for the district composed of the counties of Botetourt, Rockbridge, Kenhawa, Greenbrier, and Monroe, in the western district of Virginia, it appears

“ That, of the polls taken in the county of Botetourt, Thomas Lewis had 155 votes, and Andrew Moore had 305 votes: that, out of the persons who voted for Thomas Lewis, 23 were unqualified to vote; and that out of the persons who voted for Andrew Moore, 28 were unqualified to vote.

“ That, of the polls taken in Rockbridge, Thomas Lewis had 65 votes, and Andrew Moore had 321 votes: that, out of the persons who voted for Thomas Lewis, there were

4 persons unqualified to vote; and out of the persons who voted for Andrew Moore, there were 20 persons unqualified to vote.

1804.  
8th Congress,  
1st Session.

“That, of the polls taken in Kenawha county, Thomas Lewis had 161 votes, and Andrew Moore had one vote: that, out of the persons who voted for Thomas Lewis, there were 90 persons unqualified to vote.

Report of the  
Committee of  
Elections.

“That, of the polls taken in Greenbrier, Thomas Lewis had 539 votes, and Andrew Moore had 103 votes: that, out of the persons who voted for Thomas Lewis, 202 were unqualified to vote; and out of the persons who voted for Andrew Moore, 32 were unqualified to vote.

“That, of the polls taken in Monroe county, Thomas Lewis had 84 votes, and Andrew Moore had 102 votes: that, out of the persons who voted for Thomas Lewis, 36 were unqualified to vote; and out of the persons who voted for Andrew Moore, 44 were unqualified to vote. Hence it appears,

“That all the persons who voted for Thomas Lewis, in the several counties aforesaid, which compose the western district of the State of Virginia, were 1,004; and that all the persons who voted for Andrew Moore, in the said counties, were 832.

“It further appears, on a deliberate scrutiny, that, of the above votes, 355 persons voted for Thomas Lewis who were unqualified to vote, and that 124 voted for Andrew Moore who were unqualified to vote; and that, by deducting the unqualified votes from the votes given for each of the parties at the elections, Thomas Lewis has 649 good votes, and Andrew Moore has 708 good votes, being 59 votes more than Thomas Lewis: whereupon,

“Your committee are of opinion that Thomas Lewis, not being duly elected, is not entitled to a seat in this House. And they are further of opinion that Andrew Moore, who has the highest number of votes, after deducting the before-mentioned unqualified votes from the respective polls, is duly elected, and entitled to a seat in this House.”

*Ordered*, That the report be committed to a Committee of the Whole House on Wednesday next.

MARCH 1, 1804.

The committee was discharged; and *Resolved*, That the memorialist and the sitting member shall, if they desire it, be heard by counsel before the bar of the House.

On the 3d of March, 1804, the preceding report was taken into consideration in the House.

Mr. Moore appeared at the bar, and spoke in favor of his memorial, claiming the seat of Maj. Lewis.

Mr. Jones, the counsel of Maj. Lewis, then spoke in favor of his right to the seat.

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8th CONGRESS,  
1st Session.

Proceedings on  
the report of  
the committee.

Mr. GRIFFIN moved to postpone the further consideration of the report until the first Monday in December; which motion was rejected, yeas 37, nays 73.

Mr. J. CLAY spoke against the report, on the ground that the sitting member had not received due notice to examine witnesses, on a canvass of votes in one of the counties.

Mr. J. RANDOLPH spoke at length in favor of that part of the report which declares the sitting member not entitled to his seat, without expressing an opinion on the propriety of admitting Andrew Moore to a seat, when the House adjourned without taking the question.

On the 5th of March the subject being resumed, Mr. R. GRISWOLD moved a postponement of the further consideration of the report till the first Monday in November, that, in the mean time, opportunity should be given to ascertain facts.

Mr. DAWSON opposed the postponement.

Mr. J. CLAY also opposed the postponement, and declared, for reasons assigned by him, that he should vote in favor of the first part of the report, declaring that Thomas Lewis does not appear to be entitled to a seat, and against the second part, declaring Andrew Moore entitled to a seat—that a new election might be held.

A debate ensued on the motion to postpone, which continued the whole day, when the question was taken, and the motion lost, yeas 36.

A division of the question on the last clause of the report having been called for,

The question was taken on the first member of the sentence, expressing the opinion of the Committee of Elections, to wit: "That Thomas Lewis, not being duly elected, is not entitled to a seat in this House," and carried in the affirmative, yeas 68, nays 39.

Petitioner admitted to the seat.

The question was then taken on the second, to wit: "That Andrew Moore having the greatest number of qualified votes, independent of the bad votes above mentioned, is entitled to a seat in this House," and likewise carried in the affirmative, yeas 64, nays 41. [See National Intelligencer, 7th March, 1804.]

And thereupon the said Andrew Moore took his seat.



1804.  
8th Congress,  
1st Session.

CASE XXI.

DUNCAN McFARLAND vs. SAMUEL D. PURVIANCE,  
*of North Carolina.*

[The neglect or refusal of the inspectors or clerks of elections, to comply with the requisitions of the election laws of the State, as to taking the oaths prescribed, &c. vitiates the election. It appears also to have been conceded that the election in one county of a district being void, does not vacate the seat of the sitting member, having the majority in the other county.]

Notice to take testimony, must be served on the opposite party, agreeably to law, (see acts of Congress of 1797, chap. 25, and 1800, chap. 28,) and the depositions reduced to writing, and signed as therein required, or they will be rejected on the hearing.

In North Carolina there may be more votes than taxable polls, since those who formerly paid taxes, and had the right of voting, appear to retain that right, though they have ceased to be taxed.]

On the 8th of February, 1804, allegations were presented to the House by Duncan McFarland, of North Carolina, complaining of the undue election and return of Samuel D. Purviance, one of the members returned from that State, and on the 29th day of February, the Committee of Elections, to whom the petition and papers, and other communications, had been referred, made the following report :

“ That at an election held at the times and places directed by a law of the State of North Carolina, for the election of a member to serve in the eighth Congress, for the seventh district of said State, among other complaints alleged by Duncan McFarland, it is proved by testimony, legally taken in presence of William McCarroll, the voluntary agent of Samuel D. Purviance, that, at the elections held at the different election districts into which the county of Montgomery is, by law, divided, the inspectors and clerks of the elections held at the several election divisions of the said county of Montgomery not only neglected, but refused,\* to take the oath obliging them to act with justice and impartiality, as directed by an act of Assembly of North Carolina, passed in the year 1802, notwithstanding that they were thereto required by Duncan McFarland, at the opening of the election ; therefore, the committee, without deciding on the other complaints made against the said elections, consider the neglect and refusal to take the oath prescribed by law as sufficient ground to set aside the election held for the said county of Montgomery.

Report of the  
Committee of  
Elections.

“ That, with respect to the elections held at the election districts in and for the county of Cumberland, of the con-

\* See case of McFarland vs. Culpepper, where the same point is decided.



1804.  
8th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections.

gressional district aforesaid, a notification was given, according to law, by William Cochran, Esq., on the application of Duncan McFarland, on the 5th day of October, 1803, to Samuel D. Purviance, informing him of the times and places where depositions were to be taken, in support of the complaint of Duncan McFarland against the election of the said Samuel D. Purviance.

“ That, agreeably to the notification, William McCarroll attended, and acted as the voluntary agent of Samuel D. Purviance ; that, from the examination taken on this notification, sufficient cause does not appear to change the state of the poll, so far as to set aside the elections held in and for the said county of Cumberland.

“ That all the witnesses not appearing agreeably to the said notification, a second notification was left at the house of Samuel D. Purviance, for the said Samuel D. Purviance, or William McCarroll, directed to said McCarroll, his friend, on the 2d of November, 1803, appointing another examination of witnesses on the 22d, 23d, 29th, and 30th days of that month. Of this notification, Samuel D. Purviance, then in Congress, was not informed until the 23d, viz. the day after that on which the examination was to commence, and he had authorized no agent ; and neither William McCarroll, nor any other person, attended as his voluntary agent.

“ That, on the 1st day of December, a third notification was left at the house of Samuel D. Purviance, for the said Samuel D. Purviance, or William McCarroll, his agent, or friend, directed to the said William McCarroll, to attend on the 9th and 10th days following, to the further examination of witnesses, as aforesaid ; but the notification did not, or could not, reach Samuel D. Purviance, then in Congress, in due time ; and neither William McCarroll, nor any other person, in behalf of Samuel D. Purviance, attended.

“ It further appears to the committee, that though various irregularities and abuses are set forth in the depositions taken, agreeably to the second and third notifications, and alleged to have been practised at the said election, yet that Samuel D. Purviance had not such notice as put it in his power to attend the said examination of witnesses, or to appoint an agent so to do.

“ It further appears, from the documents, that depositions were taken, and examinations made, by magistrates who were not named in the notification issued by the magistrate to whom the application was made, and without a certificate of the matters and proceedings had by him in that behalf, as the law enacted by Congress provides. It also further appears that part of the testimony so taken is in the handwriting of Duncan McFarland, one of the parties, and signed by the mark of the deponent, inconsistent with the act aforesaid, which provides that the magistrate shall cause the examination to be reduced to writing, in the presence of the

parties, or their agents ; which the committee are of opinion does not authorize the writing the examination by the parties themselves.\*

1804.  
8th Congress,  
1st Session.

“ Influenced by the aforementioned facts and circumstances, the committee are of opinion that the aforesaid testimony respecting the election held in and for the county of Cumberland, cannot be admitted or acted on by the House.

“ By comparing the certified records of the lists of taxables in said county, with the list of votes given at the election now contested, it appears that the number who voted exceeds the number of taxables in the county, viz. the number of persons who voted is 1,159, and the number of free taxable polls taken from the last returns of taxables is 1,117 ; but the committee discover that the tax lists of any year, agreeably to the laws of North Carolina, are not a perfect record of those who are entitled to vote, because citizens who, at any time, had formerly paid taxes, by the laws of that State, appear to the committee to continue to enjoy the privilege of voting, though they might, for many years, have ceased to pay taxes.

Tax lists of N. Carolina not a perfect record of those entitled to vote.

“ Therefore, your committee are of opinion that there is not sufficient legal testimony to set aside the election of Cumberland county, so as to vacate the seat of Samuel D. Purviance.”

This report was referred to a Committee of the Whole House, who, on the 8th of March, 1804, were, on motion, discharged from the further consideration thereof, and the subject appears not to have been acted on again during that session of Congress. At the succeeding, to wit, the second session of the eighth Congress, Duncan McFarland again presented his memorial to the House, praying that the House would “ take into consideration, and ultimately decide upon the subject-matter of his memorial, presented the 8th of February last.”

A second memorial presented by the petitioner was never finally acted on, and the sitting member consequently retained his seat.

This new memorial was referred to the Committee of Elections, but it does not appear that any report was ever made thereon.

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\* The law prescribing the mode of taking testimony in cases of contested elections is no longer in force. See *ante*, p. 16.

1804.  
8th Congress,  
1st Session.

## CASE XXII.

SAMUEL J. CABELL vs. THOMAS M. RANDOLPH, of Virginia.

[It is incumbent on a person contesting the election of a sitting member, to be prepared, *within a reasonable time*, to exhibit, in legal form, the evidences on which he intends to rely in support of the allegations contained in his petition.]

On the 18th October, 1803, the memorial of Samuel J. Cabell, of Virginia, was laid before the House, complaining of the undue election of Thomas M. Randolph, of that State, and on the 9th day of March, 1804, the Committee of Elections made the following report, to wit:

Report of the  
Committee of  
Elections.

“That having examined the depositions and papers referred to them, they discover that the land lists of all the counties of which the district is composed are wanting, and the lists of voters of all the counties but one (*viz.* Fluvanna county) are also wanting. The committee also inform the House, that, by letters from the memorialist of the 13th of October and 3d of November, the committee were requested not to proceed until he could procure and transmit further documents. That by another letter from the memorialist, of the 5th of January, accompanied with a protest against documents then before the committee, he again made a request that the committee would defer taking the subject under consideration. Afterwards the memorialist was notified, by the direction of the committee, to be prepared, and to attend the committee himself, or by his agent, in order to obtain a decision. He has not complied with the notification, and the committee observe no facts, from examining the documents submitted to them, sufficient to invalidate the claim, or set aside the return of Thomas Mann Randolph.

Notice given to  
petitioner of a  
time for hear-  
ing, and he re-  
quired to sub-  
stantiate his al-  
legations.

Sitting mem-  
ber entitled to  
his seat.

“Therefore, the committee are of opinion that Thomas Mann Randolph, returned as a member for the congressional district composed of the counties of Albemarle, Amherst, and Fluvanna, in the State of Virginia, is entitled to his seat in the House.”

This report was ordered to lie on the table; and no further proceedings took place upon it.

## EIGHTH CONGRESS—SECOND SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
VARNUM,  
LIVINGSTON,  
KENNEDY,

Mr. EPPES,  
CLASSETT,  
ELMER.

### CASE XXIII.

JOHN HOGE, of *Pennsylvania*.

[Where the Legislature of a State have failed to “prescribe the times, places, and manner” of holding elections, as required by the constitution, the Governor may, in case of a vacancy, in his writ of election give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice. In this case the notice was short, (in effect only two days,) yet as the time prescribed was a day fixed for a general election, to wit, of electors for President and Vice President, it was *held* to be sufficient.]

On the 30th of November, 1804, a petition, signed by sundry citizens of Washington county, in Pennsylvania, was presented to the House, alleging an illegal election and return of John Hoge as a member from that State, who claimed a seat as the successor of William Hoge, resigned. On the 19th of December following, the Committee of Elections, to whom it had been referred, made their report, and put the House in possession of the facts on which the petitioners rested their case. It is in the following words, to wit:

“That William Hoge, member of the House of Representatives for the eighth Congress, having, by letter to the Governor of the State of Pennsylvania, dated the 15th of October, resigned his seat in Congress, the Governor, in pursuance of the provisions made in the second section of the first article of the constitution of the United States, issued a writ of election to supply the vacancy which had thus taken place. That the said writ was issued on the 22d day of October, and the election directed to be held on the 2d day of November, eleven days after the date of the said writ: that the writ was brought by the mail to the prothonotary’s office in Washington county on the 30th of October, but not proclaimed by the sheriff till the 31st.

Report of the  
Committee of  
Elections.

“It appears to the committee that though, by the second section of the first article of the constitution of the United States, it is made the duty of the Executive authority of the respective States to issue writs of election to fill vacancies, yet, by the fourth section of the said article, it is made the duty of the Legislature of each State to prescribe the times,

1804.  
8th CONGRESS,  
2d Session.

Report of the  
Committee of  
Elections.

places, and manner of holding such elections. It appears, however, that several elections to supply vacancies in Congress have been held heretofore in Pennsylvania; yet, on examining the laws of that State, it appears that no law exists prescribing the times, places, and manner of holding elections to supply such vacancies as may happen in the representation in Congress; and consequently, if the election of John Hoge is, on this account, set aside, no election can be held to supply the vacancy until the Legislature of the State enact a law for that purpose.

“By the law for the general election of Representatives to Congress for Pennsylvania, the sheriff is to give thirty days’ notice before the election, and to make the returns within ——— days after it. This election was held near five months before the expiration of the existing Congress. By the law of said State, for supplying vacancies in the State Legislature, the Speakers of the respective Houses shall issue writs to supply vacancies that may happen, giving at least ten days’ notice. The Governor, in the case now before the committee, has directed the election to be held on the same day, &c. on which the electors for President and Vice President were to be chosen. There is no proof before the committee of any abuse in the manner of conducting the election in obedience to the writ issued by the Governor.

“While the committee are of opinion that the Legislature of Pennsylvania ought to have appointed, as near as might be, the times as well as the places and manner of holding elections to supply vacancies in Congress, and that in ordinary cases a longer period ought to intervene between the time of public notice and the day of holding the election, yet, considering the special circumstances connected with the election of John Hoge, and particularly that the election took place on the day fixed by the State Legislature for the appointment of electors for the State of Pennsylvania, the committee are of opinion that John Hoge is entitled to a seat in this House.”

In Committee of the Whole House, 19th December, 1804, the foregoing report being under consideration,

Debate on the  
report.

Mr. LAMB said he was opposed to the report of the Committee of Elections; he thought it a duty, therefore, to assign the reasons of his opposition. Were not the report to operate as a precedent for future decisions, he should have contented himself with a silent vote; but on this occasion he could not forbear expressing his dissent to the doctrine advanced by the committee in support of the seat of the sitting member.

The committee had made four points in their report: that the constitution gives to the Executive of the State the power of issuing writs of election to supply vacancies; that if the election of Mr. Hoge be set aside, no election can be held to supply the vacancy until the Legislature of Pennsyl-

vania pass a law regulating special elections ; that there exists no law in Pennsylvania for the regulation of special elections for members of Congress ; and that the notice of the Governor was sufficient, because it directed the election to be held on the same day on which the electors for President and Vice President were to be chosen.

1884.  
8th Congress,  
2d Session.

Speech of Mr.  
Leib, against  
the report.

He would not deny that the constitution of the United States gave to the Executive the power of issuing writs of election to supply vacancies, but he denied the power of the Executive to prescribe the *manner* and to fix the *time* of holding the elections. In the fourth section of the first article of the constitution, it is declared "that the time, place, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." It is evident therefore that although the Executive may have the power of notifying the vacancy, and directing it to be supplied, yet that he cannot prescribe the time, the place, or the manner of carrying it into effect, this power being specifically delegated to the Legislature. If he can prescribe the time, he certainly can prescribe the place and manner, for the doctrine contended for implies an absolute discretion, and if the place and manner be also placed in Executive hands, he is vested with an absolute control over all special elections. Are the committee prepared to sanction such a doctrine? Will they admit that elections on which the fate and safety of the nation may sometimes depend, shall rest upon Executive will?

Under the construction given to the constitution by the Committee of Elections, the Governor may have directed all the citizens of Washington county to hold the election at the town of Washington, or at any other town he pleased, and he may have conveyed the superintendence of it to other officers than those appointed by the people. The power to issue writs to supply vacancies comprehended every incidental power, and the special election was wholly dependent upon Executive discretion.

He agreed with the Committee of Elections in the second point, that if no law exists to regulate special elections, and the election of Mr. Hoge is set aside, no election can be held to supply the vacancy until the Legislature of the State shall enact a law for that purpose ; but he contended that a law did exist, and that the general rule governed the special case. The law for the regulation of the general election for members of Congress was the rule on this subject, and this rule ought to have governed the special case in question. By this law thirty days' notice is to be given, but in this instance only one day's notice was allowed. If thirty days' notice were deemed not more than sufficient for a general election, surely a special election, not less important to the district, required an equal time for information to be diffused, and consideration to be matured ; and if this notice, pointed out by the law, had



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8th Congress,  
2d Session.

Speech of Mr.  
Leib.

Denies the suf-  
ficiency of the  
notice of the  
election.

been given, he would dare affirm that the result would have been extremely different.

The Committee of Elections suppose that because the election was notified for the day on which the election for electors of President and Vice President took place, it was a sufficient notice. The testimony upon the table showed that only one day's notice had been given; that the writ had not been received until the thirtieth, and that the advertisement of the sheriff was not even prepared for publication until the thirty-first of October; the notice, therefore, could not have issued until the morning of the first of November, one day before the election was to be held. The county of Washington comprehends not less than six election districts, and is extensive, and he would ask how it was possible for the electors to be informed in one day. He averred that in Philadelphia, where there are so many daily prints, and where information could travel with so much rapidity, that even there one day's notice would not enable the people to be informed; and could this be done in Washington, where the population was diffused over an extensive surface? It certainly could not.

The notice of an election for electors was no notice for a member of Congress. The electoral election excited little attention, because it was not disputed; and as there was no opposition, the people remained at home. How then did this operate as a notice? Those only who attended could have been informed. And was the notice to them to be taken as a notice to all? Would a notification of an election for charter officers in any of our towns be deemed a notice of an election for a legislator of the United States? and if not, by what process could the notice in the present case be made to apply? Are the rights of the people to be held by such tenure as is implied in this doctrine? He trusted not; and he hoped, therefore, that the Committee of the Whole would not affirm the report of the Committee of Elections.

Speech of Mr.  
Findley, of Pa.  
in favor of the  
committee's re-  
port.

Mr. FINDLEY said that being chairman of the Committee of Elections, it was his duty to give information to the Committee of the Whole House of the principles on which that committee made their report; that, in order to do this, it was necessary to state in what manner the case was submitted to the Committee of Elections. This, he said, was the more necessary, as no election had ever heretofore been contested before Congress on the same principles. No opposing candidate claimed the seat; no unlawful vote was even suggested to have been given; no officer entrusted with conducting the election was charged with error or corruption. There were two points alone, therefore, on which the decision must rest. The one was the constitutional authority of the Governor to issue a writ to supply the vacancy that had happened; the other was, whether the Governor had exercised that authority in an incorrupt or unjustifiable manner. He



said that the Committee of Elections had not been unanimous in approving the report; that two had voted against, and four for it; that in this case, it not being necessary, he had not given his opinion; but that now, when the report was brought before the Committee of the Whole House, and the case having originated in the State which he represented, and with whose laws and practice respecting elections he ought to be acquainted, he claimed indulgence and attention in offering some further explanations on the subject. For this purpose, he would examine the constitution as far as it related to the case. In the second section of the first article of the constitution, it is said, "when vacancies happen in the representation of any State, the Executive authority thereof shall issue writs of election to fill such vacancies."

1804.  
8th Congress,  
2d Session.

Speech of Mr.  
Pinckney.

In the fourth section of the same article, it is said, "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

Mr. F. said that on these constitutional provisions there was a difference of opinion; that, ever since the commencement of the Federal Government, he had understood the general opinion to be, that the fourth section related solely to the general elections of Senators and Representatives, but not to supplying vacancies that might happen; that the State of Pennsylvania, and several other States, had uniformly acted agreeably to this construction of the constitution; that the State of Pennsylvania had enacted five different congressional election laws, all differing in several principles from each other, three of which he had assisted in preparing; but on all these occasions, though influenced by different parties, there had been but one opinion on this subject, and but one practice. In all cases the issuing of writs to fill vacancies was left to the discretion of the Executive, and in, he believed, four if not five cases, which had happened previous to the present, the practice had been agreeably to this opinion. He said that he did not maintain that his opinion, or the opinion of the State he represented, on which it had so uniformly acted, decided the true sense of the constitution; but he was still of opinion that it seemed to be the fairest construction, at least in cases where the Legislature had not interfered. The Executive shall issue writs, is the language of command; it renders the issuing of the writs an indispensable duty. The fourth section is equally positive in enjoining on the Legislature to appoint the times, places, and manner of appointing Senators as of Representatives, yet in the third section the Executive is authorized to appoint Senators to supply vacancies in the recess of the Legislature, and this is done probably to every Congress: but he believed the Legislature of no one State had

Of the right of  
the State Ex-  
ecutive to issue  
writs to fill va-  
cancies.

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Speech of Mr.  
Findley, in fa-  
vor of the re-  
port.

prescribed any rules for supplying vacancies in the Senate, though the constitutional injunction in that case on the Executive is certainly not so positively expressed, as with respect to issuing writs to supply vacancies which may happen in the Representatives. Taking the fourth section of the first article of the constitution literally, as it applies to the general elections, it is impossible for the Legislature to mention the day on which a vacancy may happen, or consequently to appoint the day on which an election to supply a vacancy should be held, as it can do with the general election; therefore, it appears evident that the constitution does not contemplate legislative interference in this case, though it does not restrain the Legislature from establishing rules respecting it, if they choose to do so.

Mr. F. said that, from a view of the constitutional provisions respecting elections, and some other objects, it had been the opinion of many that they were designedly calculated to give a latitude to the States to vary their conduct with respect to forms and circumstances, provided the essentials were preserved. On this ground only can the great variety of practice, under these rules, and all admitted by Congress, be accounted for. The first section of the second article of the constitution directs that "each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors," &c.

From these words, Pennsylvania and several other States have always been of opinion, and practised accordingly, that it was the duty of the State Legislatures to prescribe the manner and rules agreeably to which the citizens should appoint the electors; but the Legislature of New York, and perhaps some other States, have not only always prescribed the rules or manner, but have themselves appointed the electors. This he said was more essential to the rights of the citizens than the case now before the committee; and yet, though universally known, had been, in every instance, admitted by Congress. The rule for the representation in each State has been prescribed by the constitution; yet, in many States, the Representatives are chosen at a general election; in others, in single districts. In other States, even in Pennsylvania, some districts choose three members, some two, and some but one; but all of them may be chosen from any part of the State. Some other States have been divided, indeed, into single districts, and obliged to vote for candidates residing within their respective districts. He said he would not detain the committee with further instances of the various, and yet approved practices under the constitution, but hoped that even the members who might be of opinion that Pennsylvania had not given the constitution, in the instance in question, the most correct construction, that yet they would duly consider other instances

of variety of construction which had hitherto passed, not only without objection, but with approbation.

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8th CONGRESS,  
2d Session.

Mr. F. said that, since this case was returned to the Election Committee, he had heard the opinion of the constitutional provisions, agreeably to which Pennsylvania had acted, called in question, but never before; that the objections were new to him; but, upon examining the laws of different States, he had discovered that the Legislatures of two or three States, though they had not literally prescribed the times for holding elections to supply vacancies, yet they had prescribed such rules to the Executive, in doing so, as answered the same purpose, and thought they did right; but Pennsylvania, and some other States, had not done so in any instance, and that in no instance, before the present, had an election been questioned, because the Legislature had not appointed these rules. The Legislature of Pennsylvania, not having prescribed any rules to the Executive to regulate his duty in issuing writs to supply vacancies, did not release the Governor from the constitutional responsibility of performing a duty so positively and conditionally enjoined. Hence, Mr. F. concluded that the election could not be set aside merely on account of the Legislature not having enacted a law to prescribe the time of holding the election. The Governor had acted in obedience to the express words of the constitution, and violated no law of the State. Setting aside this election on this ground, would virtually annul all the elections to supply vacancies in Congress that had ever taken place in the State of Pennsylvania, and in some other States.

Speech of Mr.  
Findley, explanatory of the  
committee's report.

By the fourth section of the first article of the constitution, Congress is authorized, by law, to prescribe the time, place, and manner of holding elections; but this must be done by law, not by a vote of the House, after an election was over; therefore, that power cannot apply to this case. Congress has passed no such law.

Mr. F. said, if the report of the committee was rejected, it must be on other grounds than this. It could not be because the Executive exercised his constitutional discretion, but because he had exercised it in a corrupt, or in such an indiscreet or improper manner, as to vitiate the election. This was a fair subject of inquiry, on which there might, and probably would be, a difference of opinion; and, with respect to which, he admitted the propriety of several of the objections made by his colleague, who had just sat down, (Dr. LEIB.)

The Governor, it appears, issued the writ immediately on the resignation of William Hoge coming to him. He directed the election to be held on the same day, at the general election for the choice of electors for President and Vice President. The writ, it appears, laid one day in the prothonotary's office, before it was proclaimed, the sheriff

1864.  
8th Congress,  
2d Session.

Speech of Mr.  
Findley.

and prothonotary being from home. The notice, after proclamation before the election, was only a part of three days, and not sufficient time for the citizens to be informed of it at their homes, notwithstanding that it is the smallest district in the State; but those who did attend at their respective districts to vote for electors, were actually informed by persons sent for the purpose. That this was the case, was proposed to the committee, and proved by the sitting member; for the fact appearing to be admitted by the petitioners, such proof was thought unnecessary. It appeared probable to the committee that the district at the seat of justice at which the Governor's writ first arrived, had the advantage of earlier information than other districts; but this was incidental, and as the prothonotary, to whose office the writ came, and was opened, and the sheriff, &c. were opposed to the election of the sitting member, they had at least an equal advantage of the earliest notice, and those most zealous for the electoral ticket were not supposed to be his friends. Partial or fraudulent intention is not complained of by the petitioners; they are, indeed, few in number, and appear all to have had the earliest notice. There is no petition from any citizens, complaining that they themselves were deprived of their votes for want of notice. The election for the choice of electors was not so numerous as was reasonably expected; but if the Governor had given the ten days' notice, directed by law, for filling vacancies in the State Legislature, and claimed by the petitioners, this would have happened in about a week after the other, respecting which, the probability, justified by all experience in Pennsylvania, is, that it would have been still less numerous. This appears to have been the Governor's opinion. It was also the opinion of several of his colleagues from the eastern parts of the State, who had seen, and been informed by the Governor that he had issued the writ, and who had first informed himself that it had been issued. They, and all his other colleagues, with whom he had conversed on the subject, he understood, approved of the Governor's conduct, till they heard of the result of the election, and there was no proof before the committee that the shortness of the notice operated in favor of the sitting member more than the other candidate. All the voters for both candidates agreed in voting for the same electors, notwithstanding that there was little time for concert. On the whole, Mr. F. concluded that, as the issue of the election had occasioned exceptions to be taken to the shortness of the notice, he wished that longer notice had been given, though he had approved of issuing the writ. But, as it was conducted under an authority vested by the constitution, on the same principle which had been always acted on in Pennsylvania, and several other States, and never heretofore objected to by Congress, which was the

Former practice justifies the course of the Governor in this case.

only competent judge in the case, and as no corrupt intention or abuse was complained of, he thought it his duty to vote in favor of the report of the Committee of Elections. If the election was set aside till a law would be passed to prescribe the time, probably the district would not be represented this session, which he thought an argument of weight, but of little importance compared with deciding the principle; in doing which, if the report of the Committee of Elections was rejected, the decision might virtually vacate the seats of the members, and would condemn all the elections heretofore made in Pennsylvania, and some other States, to supply vacancies to the House of Representatives.

1894.  
8th Congress,  
2d Session.

Mr. J. CLAY could not agree with the Committee of Elections, in the opinion that there was no law in Pennsylvania regulating the place and manner of holding special elections for members of Congress to supply any vacancy which might occur in the representation from the State. By turning to the law respecting general elections, he found that members of Congress were to be chosen by the inhabitants qualified to vote for the most numerous branch of the State Legislature, and that those elections were to be held at the same places, conducted in the same manner, and by the same officers, as for members of Assembly. In cases of general elections, therefore, there could be no difference of opinion; as these were to be governed in both cases by the same rules, it was fair to infer that special elections for Representatives were to be conducted in the same manner as special elections to fill vacancies in the Legislature of the State. By the laws of Pennsylvania, it appears that, in cases of vacancy in the representation of any county, the Speaker is to issue a writ at least fifteen days before an election can be held, and the sheriff of the county must make proclamation, and give at least ten days' notice to the people. The reason of the law was evident; it was intended to prevent the people from being surprised, and to give them time to look round for suitable persons to represent them. If the reason was good, as applied to the State Representatives, who were all chosen in single counties, it was more so as applied to Representatives in Congress, who are chosen in districts composed in some instances of three or more counties. He, therefore, was of opinion that they should be governed by the same law. The committee, however, had been told, by his colleague, (Mr. FINDLEY,) that the Legislature never intended to make any law on the subject; that they conceived they had no power; that the constitution of the United States, by saying that, in case of vacancy in the representation of any State, the Executive thereof should issue a writ of election to fill such vacancy, was imperative, and, by making it the duty of the Governor to issue such writ, gave him the sole power of regulating

Speech of Mr.  
J. Clay.

1804.  
8th Congress,  
2d Session.

Speech of Mr.  
J. Clay.

the time, manner, and place of holding the election, and precluded all legislative interference. We were not to judge of the law, by the alleged intention of the Legislature ; if they had mistaken their own powers, or the powers of the Executive, their mistake was not to govern the decisions of Congress. All that we had to do was, to inquire whether there was a law applied to the case, and whether its provisions had been complied-with. But he could not suppose that the Assembly had so far misconceived the constitution. By the fourth section of the first article of that instrument, the State Legislatures were empowered to regulate the time, place, and manner of holding elections for Senators and Representatives to Congress. This power was not confined to *general* elections, but must necessarily extend to elections to fill vacancies. It was true that, in special cases, they could not direct the precise time, but they might prescribe the notice which should be given ; and shall we be told, because the very day cannot be named, that the number of days which shall intervene between the proclamation of the sheriff and the election, shall not be fixed by law ? The notice is part of the manner, and the Legislature, though they cannot fix the time, may fix, and have fixed, the places and manner. It is true the Executive is compelled, by the second section of the first article of the constitution, to issue a writ of election to supply a vacancy ; but this writ he contended was merely a notification. It gave no power, no discretion. If the Governor had a discretion, it might extend to the place and manner. The northwest district of the State is very extensive ; and, under this discretion, the Governor might so direct an election, that, in case of vacancy, the town of Pittsburg alone might be notified, and would alone vote for the member to supply that vacancy. But the case of a choice of a Senator during the recess of the Legislature had been resorted to as analogous to that of Representatives. If the Senators were chosen by the people, the case would be in point. Senators, when vacancies happen during the recess of the Legislature, are chosen by the Executive, and, therefore, there was no necessity for the Legislature to prescribe either time, place, or manner, as it would be absurd to suppose that the Governor should notify himself, or change his residence, in order to make an appointment. Would it be argued, therefore, that it was unnecessary to give the people due notice of an election for Representatives ? Surely not.

But, said Mr. CLAY, the Governor has himself recognised the law in the very writ. Were not the same officers appointed to conduct this election as were appointed to conduct the general elections ? Were not the ballots given in the same manner, counted by the same persons, and returned by the same judges ? Whence did they derive their



authority, but from the law? and the law ought to have been complied with in every other respect. It is true, an election was to be held throughout Pennsylvania for electors of President and Vice President. The Governor, actuated by the most laudable motives, in order to save the county of Washington the expense of a special election, directed that a member of Congress should be chosen on the same day to fill the vacancy caused by the resignation of Mr. Hoge. But the committee would recollect that, although the people knew that electors were to be appointed, they did not, they could not, know of the intended choice of a Representative. In Pennsylvania the people do not, as in some of the Southern States, all meet at one place in the county to give their votes. No, each county is divided into a number of districts, in each of which an election is held, so that no person has more than a few miles to go to the poll. The county of Washington is divided into six or eight of these districts. The sheriff's proclamation was issued on the first day of November, and the election was held on the second; although the people of the town of Washington, and its immediate neighborhood, might receive due notice, it was impossible that those who resided and voted in the remote parts of the county, should. Indeed, it was evident that they did not. An election for electors was held on the same day. It was generally known that no opposition was intended, and the people were, therefore, less anxious about the result. The electors were chosen by a general ticket throughout the State; the votes of any one county were, therefore, deemed of comparatively little importance. This was not the case, however, with a Representative in Congress. The county of Washington forms a district for the choice of one member. The people of that county, not having the co-operation of any other part of the State, necessarily depended for success on their own vigilance and exertions. Yet what was the result? The bare majority given for electors exceeded the whole number of votes given, both for the sitting member and for the rival candidate. It was therefore evident that the people had not notice sufficient of the congressional election. Mr. C. did not mean to impeach the motives of the Governor; on the contrary, he thought them praiseworthy; but substance ought not to be sacrificed to form. The object of elections was, that the majority of the people might have an opportunity of giving their fair and unbiassed suffrages in the choice of persons to represent them, and not through any mistaken constructions, however pure might be the intentions of the Executive, or of the Legislature. This object was defeated in an election. It was a manifest violation of the rights of the people, and ought not to be confirmed. This opportunity was not given in the present instance, or the sitting member would not have been returned. Con-

1804.  
8th Congress,  
2d Session.

Speech of Mr.  
J. Clay, in op-  
position to the  
report of the  
committee.



1804.  
8th Congress,  
2d Session.

Speech of Mr.  
Elliot.

The power ex-  
ercised by the  
Governor in  
this case, arises  
under the con-  
stitution of the  
United States.

prescribes the manner that citizens shall vote, by ballot, &c. The laws of Pennsylvania institute the election officers, and prescribe their duty. The constitution of the State and the United States and the laws of the State declare the officer that shall be voted for; if the election officers conduct elections for officers not instituted by any of those authorities, it is void; otherwise, it is valid. It will not be said that an election to fill vacancies in Congress is not authorized by the constitution of the United States, or that the Governor's writ did not sufficiently authorize the election officers.

Mr. ELLIOT said that the very comprehensive and argumentative examination of this question, which had been made by the gentleman from Pennsylvania, (Mr. FINDLEY,) would probably have been conclusive to his mind had any doubt existed on the subject. Without repeating, however, any of the arguments of that gentleman, a candid consideration of the provisions of the constitution, relative to this subject, will evince the correctness of the position taken by the Committee of Elections. In the second section of the first article of the constitution, it is declared that "when vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies." It is an established principle that a constitutional delegation of a general power includes a grant of all the subordinate and incidental powers requisite to give effect to the principal one, unless restrained, limited, or placed elsewhere by another part of the constitution. What is the power given to the State Executives by this clause of the constitution? Not merely, as some gentlemen seem to believe, an authority to issue writs of election, but to give to those writs a certain operation and effect, that of filling a vacancy. They have authority to issue writs of election, to cause elections to be holden in consequence, and the vacancies filled. Is the power here given to the Executives of the States limited or taken away by any other part of the constitution? If not, I shall not suffer myself to inquire into the discretion or indiscretion with which it has been exercised on the present occasion, as I believe the constitution has placed it beyond our power of inquiry or censure. By the fourth section of the constitution, it is declared that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." The words *by law*, in this section, are peculiarly emphatical. Congress can do nothing on this subject, but *by law*; the State Legislatures may act by resolutions, and in that manner Senators are commonly chosen. This section appears to have been intended to regulate the general election of the whole number of Senators and Representatives to which a State is entitled,

and to have no application to the case of vacancies. But if this construction be not the correct one, it will be necessary to adopt this construction of the two clauses taken together, that although the State Legislatures have a right to regulate the elections in cases of vacancy, yet the Executive possesses a complete discretion on the subject, under the legislative interference. Such, we are told, has uniformly been the practical construction in Pennsylvania. Two questions are only to be answered: Was the election in the present instance held in pursuance of a power delegated by the constitution? Certainly it was. Was it regularly and legally conducted? It appears to have been conducted, except as to time, conformably to the laws of Pennsylvania which govern other elections. Believing that, under the peculiar circumstances of the case, no injustice has been done, and believing that the election was constitutionally conducted, I shall vote in favor of the report of the committee.

1804.  
8th Congress,  
2d Session.

Mr. LUCAS. Believing, as I do, that the report under consideration involves an important question, I cannot forbear to add a few remarks. It appears that members of Congress may be elected under two different circumstances: periodically by general elections, accidentally by special elections. The election of the sitting member, which is the subject of the report, is a special election, an election to fill the vacancy of William Hoge, resigned. It is not alleged that any illegal votes have been given, or any fraud practised in conducting that election; it is merely contended, by those opposed to the report, that the election ought to be set aside, because the time, place, and manner of holding the election have not been according to law, or because the power of prescribing the time, manner, and place has been assumed by an improper authority. Turning to the second section of the constitution of the United States, we find this provision: "When vacancies happen in the representation from any State, the Executive thereof shall issue writs of election to fill such vacancies." From this it appears the Governor is only vested in part with the powers to cause an election to be holden; that is, the power of issuing a writ of election, which gives him the initiative, but this initiative does not destroy the power placed by the fourth section of the same constitution in the State Legislature, which is "that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." The words *holding elections* indisputably include all kinds of elections. A special election is not less an election than a general one; and unless the constitution expresses an exception to that general principle, it follows necessarily that the State Legislature or Congress have the power of prescribing the times, places, and manner of holding elections for Representatives. Thus, from the provision in the constitution, which vests the

Speech of Mr.  
Lucas, against  
Mr. H.'s right  
to a seat.

1804.  
8th Congress,  
2d Session.

Speech of Mr.  
Lucas, against  
the right of the  
sitting member

ed; but this objection has been anticipated on this floor, and great endeavors have been made to justify this shortness, I might say the want of notice, by alleging that the 2d day of November had been preferred, it being a day already appropriated for the election of electors, and that the notice given for that election would answer the purpose of the election of a Representative in Congress, whilst it would save the electors the trouble of assembling again. These considerations, more specious than solid, cannot prevent me from discovering the whole extent of danger of holding elections without certain principles and rules with respect to a previous notice. It was generally believed in Washington county, as well as in every other part of Pennsylvania west of the mountains, that the election of electors would, without any risk, be carried according to the wishes of a large majority. Hence many persons, far distant from their respective election districts, did rely upon those that were nearer to attend the election of electors; hence the result of the election of a member of Congress. Had the electors of the district been informed, as they ought to have been, that a member of Congress was to be elected on that day, although there was no danger of risking their object as to the election of electors, yet there might be some doubt as to the election of a Representative. Have we not every reason to believe, from the repeated instances of public spirit prevailing in that district, that the election would have been attended by probably more than three times the number of persons that did actually attend? and as to myself, I have a strong presumption that the result would have been quite different from what it was. Some of the gentlemen who supported the report have endeavored to justify this election on the ground of precedents. They have said that all former elections in Pennsylvania, to fill vacancies in Congress, have been holden under the same authority and circumstances. It is not improper to take notice that this election is the first of the kind that hath been contested in Pennsylvania; that as no exceptions were taken to the former ones, it is an ordinary thing that the Committee of Elections report as legal elections those that appear such from *prima facie* evidence, and they never enter into details but when the elections are disputed. Ought precedents to govern where they militate against an express constitutional provision? And will gentlemen say that elections to fill vacancies, held after thirty days' notice, such as the first election of William Hoge and others were, can be received as a precedent in point, with an election held after one day's notice?

It hath been the pleasure of some honorable members to bring into view the motives that have actuated the Governor of Pennsylvania in directing the election to be holden after so short a notice. The purity of these motives has been insisted upon, as if any member of this committee were ques-

tioning the good intentions of that magistrate ; but the intentions of the Governor, pure as I doubt not they were, cannot be the criterion to judge of the legality of this election. The Governor may think one way, and the committee another, and yet we may all be influenced by good intentions. From the present view of the subject, I am induced to vote against the report. I lean still more to the rejection of the report, as, by setting this election aside, the Legislature of Pennsylvania, which is now in session, will feel more immediately the necessity of exercising constitutional powers, and of prescribing, by law, the times, places, and manner of holding elections to fill vacancies in future.

1894.  
8th Congress,  
2d Session.

Mr. JACKSON. Mr. Chairman, two objections have been made by the gentleman to the report of the Committee of Elections. *First.* That the constitution of the United States requires that in *all cases* the times, places, and manner of holding elections shall be prescribed in each State by the Legislature thereof ; and as no law has been passed in Pennsylvania providing for the cases of supplying vacancies in case of death or resignation, that the election of Mr. Hoge is invalid. *Second.* If the constitution does not conclude the question, we have a right to examine all the circumstances incident to the proclamation of Gov. McKean, and to determine whether the discretionary power vested in him by the constitution, as the Executive of Pennsylvania—for the time being, was duly exercised or not ; and it is asserted that it was improperly exercised by him.

Speech of Mr. Jackson, in favor of the report of the Committee of Elections.

The fourth section of the first article of the constitution, upon which the superstructure of the arguments on the first point rests, is in these words : “ The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.” The language of the section clearly proves it has reference to the general elections, and precludes the idea that it was intended to include the cases of vacancies, as no human prudence could designate the proper *time* for holding elections to supply vacancies that would thereafter occur. Who can determine when the incumbent will die ? When the unrelenting hand of death shall cut the thread of life, or when some occurrence in life shall induce him to resign into the hands of the people the trust reposed in him ? And unless these things are foreseen, the State Legislature cannot say at what *time*, at what *place*, and in what *manner* elections to supply vacancies shall be held. If the Legislature were to pass a law regulating the *time* only, and leaving the *place* and *manner* to the direction of the Executive officer conducting the election, or designating the *place*, and leaving the *time* and *manner* to be fixed by him, it certainly would not be a compliance with the requisitions of the constitution, and a person thus elected would not be constitutionally entitled to a seat in this House. In the con-

1804.  
8th Congress,  
2d Session.

Speech of Mr.  
Jackson, in fa-  
vor of the re-  
port of the  
committee.

struction of a grant it is necessary that the person thereby claiming a privilege shall show that he has complied with all its requisitions, and being imperative, that the States shall prescribe the time, place, and manner of holding elections. I doubt very much whether a compliance with either requisition alone would be correctly within the meaning and spirit of the constitution.

I am the more inclined to adopt this construction, when I refer to the paragraph contained in the second section of the first article, which declares that "when vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill vacancies." Either this sentence has some meaning, or it has not. If it has any, it clearly follows that the cases of vacancies are provided for in a different way from that directed by the fourth section, which *succeeds* it. Mr. Chairman, when I contemplate the great talents and wisdom which the framers of this instrument possessed in an eminent degree, and the perspicuous and emphatic language which characterizes its provisions, that not only every paragraph, but every word of each paragraph, conveys some meaning, I cannot reject the sentence just read as a dead letter, unmeaning, and inoperative; and, unless it is rejected, the Executive authority of any State has the power, and is *required*, to issue writs of election to fill such vacancies as may happen in its representation, independent of any State law or provision, and in conformity with the *supreme* law of the land.

Some gentlemen, however, contend for a limited construction of this clause, granting to the Executive authority to issue writs of election, by denying the right of designating the time, place, and manner of holding such elections. But it is not to be presumed that a power so merely nominal would be guarded by the insertion of an independent and express provision. If, however, I err in the opinion I have advanced, I deny the propriety of making a contrary decision at this late day. The States, the great party to the compact, have, without a single exception that I know of, considered that vacancies are to be supplied by writs of election under Executive proclamations, and have not passed any law upon the subject. A respect for their decisions, for the uniform practice of this House, and a consciousness that if we err, it is on the side of justice, will, I hope, incline us to sustain the report. If we do not, I call upon gentlemen to go through the House, to examine the rights of every individual to a seat, and to decide all cases similar to the one now before us, in the same way.

Sir, we have no law in Virginia providing for similar cases. I speak from present impressions. If I am mistaken, I will thank gentlemen to correct me. Two of my colleagues (Messrs. CLARKE and WILSON) now hold their seats in virtue of elections to supply vacancies occasioned



by death and resignation. If the gentleman from Pennsylvania is not entitled to his seat upon constitutional principles, my colleagues are not. If they are, he is. One gentleman from Pennsylvania, (Mr. CONRAD,) however, varying the ground of objection, says, that the laws of Pennsylvania provide for the case, and require a notice of twenty days previous to holding elections; and, as twenty days' notice was not given, this election is void. The language of the law he read proves that he is mistaken. It provides for issuing writs of election by the Speaker of the Senate, or of the House of Representatives, as the case may be, to supply vacancies; and as neither branch of the State Legislature, as such, has any thing to do with the elections of Representatives to Congress, it must clearly apply to members of the State Legislature *only*.

1804.  
8th Congress,  
2d Session.  
Speech of Mr.  
Jackson.

I will now consider the right of examining the conduct of the Executive of Pennsylvania, and of controlling the discretionary power vested in him; and, first, permit me to declare that I believe it is entitled to the highest approbation, and was well calculated to procure a fair and honest expression of the public will. Congress were in session; the district of Washington unrepresented, and the necessity of providing for the exigency as soon as possible most apparent. An important election, the most important, sir, which occurs under our constitution, about to take place for the appointment of electors to choose a President and Vice-President of the United States; and upon that day, by the Governor's proclamation, was this election also to be holden. True, sir, a lengthy notice was not given, without suffering this election to pass by, and requiring the people to assemble a second time, under a short interval, which would have been highly inconvenient. He had reason to believe that all the people would have attended; it was eminently their duty to do so, as the magnitude of that election was great beyond comparison, when considered with the other.

Thinks the notice sufficient, under the circumstances.

A gentleman from Pennsylvania (Mr. CONRAD) has told us that he wishes the elections to be more frequent, as it is the interest and duty of the people to attend them. Where were they, I ask him, when the electors were chosen? Were they regardless of their interest and duty, asleep at their posts? Sir, the fact proves the unwillingness of the people to attend; and were the elections more frequent, their neglect would increase with their numbers. I will not dwell longer upon this subject, in supporting the conduct of the Governor of Pennsylvania. The gentleman from South Carolina (Mr. HUGER) has done ample justice to it. I now deny the right of this House to supervise or control the Executive of a free and independent State, and call upon gentlemen to show me whence the power is derived. It cannot be too often repeated that ours is a limited grant of powers; no constructive or implicative power is to be ex-



1804.  
8th Congress,  
2d Session.

exercised by us. This is the language of the constitution. It is the language of common sense. If we have the power, I ask how it is to be exercised. Shall we erect ourselves into a high court of criminal judicature with censorial powers? Shall we say the Governor of Pennsylvania acted from corrupt motives? That he was influenced by a desire to control the district of Washington in opposition to the people? Unless we do, sir, I see no ground for interposition. Mr. Chairman, there is no power vested in this House more dangerous in its injudicious exercise than the right of judging of elections, returns, and qualifications of its members. By it a party may determine of what number the minority shall consist, and even whether there shall be any minority at all. I will never consent to exercise this power, even legitimately, except in cases of emergency, or urgent necessity.

Decision of the  
House in favor  
of the sitting  
member.

The Committee of the Whole House having reported their agreement to the report of the Committee of Elections, the House then, by a vote of 69 to 38, concurred in the opinion therein expressed, to wit, "that John Hoge is entitled to a seat in this House;" and he was admitted to take his seat accordingly.

## NINTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
ELMER,  
EPPEL,  
CRITTENDEN,

Mr. SCHUNKMAN,  
BIDWELL,  
ELLIS.

### CASE XXIV.

#### THOMAS SPAULDING *vs.* COWLES MEAD, *of Georgia.*

[Evidence taken *ex parte*, and without the proper notice, will, on the hearing, be rejected.]

Congress is, by the constitution, the exclusive judge of the elections and returns, as well as the qualifications of its members, and the returns from the State authorities are *prima facie* evidence only of an election, and are not conclusive upon the House.\*]

On the 9th of December, 1805, the petition of Thomas Spaulding, of Georgia, who contested the right of Cowles Mead, of that State, to a seat in the House, was referred to the Committee of Elections, and on the 18th of the same month that committee made the following report:

“That, by a standing law of the State of Georgia, the election of persons to represent that State in this House was required to be holden on the first Monday of October, 1804, in the respective counties throughout the State. That three or more county magistrates were required to preside at the election in each of the counties, to return the names of the candidates, and the number and names of the voters, with an account of the state of the poll, and to transmit their returns, by express, to the Governor of the State within twenty days after closing the poll at said election. That the Governor was required, within five days after the expiration of the said twenty days, to count up the votes from the several counties, or such of them as might have made returns for each person, and immediately thereafter to issue his proclamation, declaring the persons having the highest number of votes to be elected to represent the said State in the House of Representatives of the United States, and to

Report of the  
Committee of  
Elections.

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\* See this case, referred to in the committee's report on the case of Hammond *vs.* Herrick, at the first session of the fifteenth Congress, where a question was raised as to the time the rights and incidents of membership commenced, and whether a member can hold an office under the United States after his election to Congress, and before he takes his seat.

See also the case of Mallary *vs.* Merrill, first session of the sixteenth Congress, in which case the votes of a town were properly given, and a certificate thereof made, and placed in the hands of the town representative, to be delivered to a canvassing committee of the Legislature, but by his neglect were not returned at all.

1805.  
9th CONGRESS,  
1st Session.

Statement of  
facts, by the  
committee.

grant a certificate thereof, under the great seal of the State, to each of them. That, by an official certificate from the Secretary of said State, it appears that the votes from the counties of Tatnal, Liberty, and Camden were not returned to the Governor within the said term of twenty days after the election, nor within the said further term of five days thereafter; and that of the votes given at the said election, and returned to the Governor within the said term of twenty days, Cowles Mead had . . . . . 4,438  
Thomas Spaulding had . . . . . 4,269

Giving said Mead a majority of . . . . . 169

“That the Governor, in pursuance of the law aforesaid, counted up the votes so returned to him within twenty days, and thereupon issued his proclamation, declaring that the said Cowles Mead was elected, and granted him a certificate thereof.

“By another certificate from the Secretary of State, it appears that after the Governor had issued his proclamation as aforesaid, that is, on the 27th day of November, 1804, the returns of the votes given at the said election, agreeably to the law aforesaid, in and by the counties of Tatnal, Liberty, and Camden, were received by the Governor, being transmitted by the presiding magistrates of said counties respectively. That both of the said certificates from the Secretary are in due form of law. That the said returns of votes from the three last mentioned counties are conformable to law in every respect, except that they were not transmitted to the Governor within the limited time of twenty days after the election. That, of the votes so returned from the said three counties after the expiration of the said twenty days,

Report.

Cowles Mead had . . . . . 27  
Thomas Spaulding had . . . . . 235  
Which, added to their respective numbers of votes returned to the Governor within the term of twenty days, and counted by him as aforesaid, gives  
To Cowles Mead, in the whole . . . . . 4,465  
And to Thomas Spaulding, in the whole . . . . . 4,504

Evidence ex  
parte rejected.

Leaving the said Thomas Spaulding a majority of . . . . . 39

“The petitioner offered depositions to prove that the cause of the failure in the transmission of the returns from the three last counties to the Governor within the twenty days after the election, was a hurricane, which rendered the roads impassable; but as the sitting member was not notified to be present at the taking of those depositions, the committee were of opinion that they were not admissible evidence.

“The petitioner then offered to procure other evidence of the same fact, and the sitting member offered to procure evidence to the contrary, that the roads were passable; but the committee being of opinion that it was not material to

the question before the House, whether the said failure was caused by the act of God, as alleged by the said petitioner, or by the fault of the returning officers, or the defect of the law in not providing a penalty upon officers for neglecting their official duty of transmitting the returns, did not receive any evidence on that point.

1806.  
9th Congress,  
1st Session.

"The sitting member stated to the committee that he could, as he was assured, by sending to Georgia, obtain proof that the election in the county of Tatnal was irregularly held, so that the whole return of that county, for that cause, ought to be rejected; but finding, by calculation, that if the votes of that county, of which twenty-four were for himself, and forty for the petitioner, were set aside, it would not affect the result of the election, he waived that objection, and rested his claim upon the principle that all the votes of the three last mentioned counties are void by the law of Georgia, not having been returned to the Governor within the time prescribed by said law.

"There is no suggestion of any fraud or intentional unfairness in the election; and the committee add, with pleasure, that the conduct of both the gentlemen claiming the contested seat, appears to have been candid and honorable.

"Upon the foregoing statement of facts, as the constitution has made this House the judge of the elections and returns, as well as qualifications of its members; as the returns from the State authorities, therefore, are only *prima facie* evidence of an election, but not conclusive upon this House; as there is in the present case satisfactory proof that the votes of the three counties in question, although the returns thereof were not transmitted to the Governor in season to be considered by him, were originally good, lawful, constitutional votes, having been given by qualified voters, on the day, at the places, and in the manner prescribed by law; and as neither the voters who gave them, nor the candidates in whose favor they were given, have done or omitted any thing, on their part, to forfeit their respective right,\* the committee are of opinion that those votes ought to be allowed, and, therefore, recommend the following resolution:

Returns of votes by State authorities are *prima facie* evidence only, and not conclusive upon the House.

Legal votes are to be received though not returned, agreeably to the State law.

"*Resolved*, That Cowles Mead, returned to this House as a member thereof from the State of Georgia, is *not* entitled to a seat, and that Thomas Spaulding is entitled to a seat in this House as a Representative of the State of Georgia."

*Ordered*, That the said report be committed to a Committee of the Whole House on Monday next.

On the 23d and 24th of December, this report was under discussion in Committee of the Whole.

The following is an abstract of the debate on the report: [See Nat. Int. of 1st January, 1806.]

\* See the case of David Bard, of Pennsylvania, where, though the return was not made agreeably to the law of the State, the election was held good. [1st Session of 4th Congress, *ante*, p. 116; also *Barney vs. McCreery*, p. 167.]

1805.  
9th CONGRESS,  
1st Session.

Abstract of the  
debate on the  
report of the  
committee, and  
in opposition  
thereto.

The opponents of the report represented it as embracing a great constitutional principle relative to State sovereignty, and the powers of the House. This question arose out of the judicial powers vested by the constitution in each branch of the Legislature, as to judging of the election of its members. In the first article, fifth section of the constitution, it is declared that "each House shall be the judge of the elections, returns, and qualifications of its own members." This section embraces three distinct objects, on which the judicial powers of each House might be exercised: the qualifications of persons returned as members; their election as members, and the returns of the persons selected. With regard to the point of qualification, that could have no bearing on the present question. As to the election of persons returned to serve as members, the constitution has given to the States the power to regulate the time, place, and manner, subject to the interposition of the laws of Congress. As to the returns of members, there is no limitation to the power of Congress to judge of them. What power, then, is given by this section? A judicial power alone. It is worthy of remark that an election and return are entirely distinct acts; where one ceases, the other begins, and *vice versa*. Where, then, is to be found the power in Congress of prescribing the time, place, and manner of making returns? That such a power existed somewhere, could not be denied, as without it an election would be nugatory. Will it be contended that this power is vested in the General Government, when it is not recognised by a single word of the constitution? It is clear, then, that, as the constitution is perfectly silent as to bestowing such a power in the General Government, it does not belong to that Government, neither was it necessary to carry into effect any power specifically given to the General Government. If, then, the power does not belong to Congress, and it must reside somewhere, it follows, from the theory of our Government, that it must belong to the States, and that the only power in this House on the subject is to *judge* of the returns, not to decide the time, place, and manner in which they shall be made, much less to dispense with the regulations which the States may make relative to them. But it may, perhaps, be asked how the judicial power of this House can be exercised without uniting with it the power contended for on this occasion. To this inquiry the answer is easy: The *right to judge*, and the *rule of decision*, are distinct things; and, while the right to judge may be in one body, the prescription of the rule may be in another. The rule, in such cases as these, must be a State regulation, when it relates to points on which the States have exclusive legislation. If this case relate to a business in which Georgia has the exclusive right to legislate, there can be no other rule than her legislation. In order to illustrate this case, suppose

good votes should be offered after the explanation of the time within which the election was directed to be held by State laws, will it be contended that this House would have a right to direct them to be received? or that the constitutional rights of the House would be impaired by being obliged to respect the regulations of a State as to time, place, and manner of holding elections? Just so as to returns. The constitutional right of the House to judge of them is not impaired, because a rule of judging is prescribed by another authority. Nothing is more common than this. It is, indeed, a leading feature in all the political institutions of the United States; the power to judge being vested in one body, and the prescription of the rule in another. All our political writers have considered this as one of the most important features in our institutions. If we can dispense, in this instance, with the time fixed for receiving returns, we may dispense with State regulations in other cases. If we can dispense with one rule, we can dispense with all; and, while the States are constitutionally fixing rules, we may be dispensing with them: a conclusion at which common sense revolts.

1805.  
9th Congress,  
1st Session.

Views of those  
opposed to the  
report.

With regard to the prevalence of the will expressed by a majority of the good votes given, it was observed that that could be only ascertained by some legal provision; and that the only way of guarding it from abuse was to preserve the laws of the State inviolate; and that though, in some few instances, a rigid adherence to them might be productive of some hardship, yet, in its general effects, it would be productive of much greater good; and it was added, that species of reasoning was as novel as unsound, which went to protect the rights of the citizens of a State, by prostrating the laws made to secure them.

To show that the law of Georgia, limiting the time within which votes should be received, was obligatory upon the House, an elaborate argument was gone into, to prove, by a minute dissection of the constitution, that, as all powers not expressly given to the General Government were reserved to the people, or the States, and inasmuch as the only power specifically given related to the time, place, and manner of holding elections, and not to the time, place, and manner of making returns, no such power resided in Congress.

From all this reasoning, it was contended that though the House had a right to judge of the returns of its members, that right must be exercised in obedience to the fixed rules of the State of Georgia, which constitutionally possessed the power of prescribing them; and that they must be considered as conclusive, unless revoked or modified by Congress.

The friends of the report remarked that the power of the House, on this subject, was vested by that part of the constitution which declares that "each House shall be the judge of the elections, returns, and qualifications of its own mem-

Argument of  
those in favor  
of the report.



1805.  
9th Congress,  
1st Session.

Summary of the  
argument in fa-  
vor of the re-  
port of the  
Committee of  
Elections.

bers;" and that this power was distinct from that which gave ultimately to the Legislature, in case they saw fit to exercise it, the power of determining the time, place, and manner of holding the elections. The words *judging of returns*, were comprehensive, unrestricted, and inclusive of every step incidental to making returns. The power could not be confined to the mere judging of the authenticity of the certificate of the returning officer, as that would be nugatory. It must likewise include the manner in which the votes were counted in districts; the manner in which they were transmitted; the place appointed for receiving them; and the ascertaining their aggregate number. It had been truly said that where the business of election ceases, that of the returns begins; which, therefore, must be considered as embracing every thing, after the votes were given. As soon as an election terminates, the candidate is elected; the only thing remaining is to ascertain the result, and this is done by the returns made. What, then, is the right of this House to judge? According to gentlemen, they have not a right to judge of the certificate of the officers of Georgia; they have not a right to judge how the votes are transmitted: but of all this the Governor is to judge, under the law of Georgia. But such a law would be a mere nullity, as it would be in direct opposition to the words of the constitution, which give to this House the right of judging of the returns of its members. The fact was, that the law of Georgia could only be considered as constituting the Governor, the organ of information to this House, which is the only tribunal to which the returns can ultimately be made. So considering the subject, there was no reason for the remark that the principle contained in the report went to set aside the law of Georgia. Should the power of the House, in this case, be denied, it would prevent us from investigating any case, however characterized by fraud, and would prostrate at the feet of an Executive officer the power so guardedly bestowed on each House. It is inquired whether we will set aside the law of Georgia, by the decision we are about to make; but it does not follow that the adoption of the report will have this effect. The law of Georgia says that the Governor shall count the votes received at a certain day; but it does not say that the House shall not count those received afterwards. We, in fact, then, carry into effect the law of Georgia, as far as it goes, and, only in case of a failure, supply the deficiency. Could there be a doubt of the principle assumed in the report, it would be removed by a denial of it, giving the power to any petty officer of the State, by suppressing the votes to deprive the member legally elected of his seat. Would this be a just principle? Is it not our principle that a majority shall govern? And is it not strange to say that a State shall have the right of violating such a principle? With regard

to a return, it might imply two things, the original certificate of the presiding officer in each election district, and the general certificate of the whole election, the several parts of which were held in different places. It was necessary that these several certificates should be examined by some general authority.

1865.  
9th Congress,  
1st Session.

Argument in  
favor of the re-  
port of the  
committee.

As a matter, therefore, of necessity, some authority must reside in the States to count up the whole number of votes and to certify the persons elected. This power was vested in different ways in the several States; whoever exercised it, could be considered only as the certifying officer, whose certificate was not a decision, but simply a return, subject to the control of this House, which is made by the constitution the judge of it. The constitution says, the House are to judge of the returns. Can those returns, therefore, be conclusive and binding upon the House? If so, the power of judging is altogether nugatory. If we cannot go out of the returns, and judge of any thing not in them, we cannot be said to possess any power over them. But the words of the constitution are precise, giving the unrestricted power to judge. The House then may receive other evidence to satisfy them, than that founded on the face of the returns, and on such evidence may either allow that which is not in them, or disallow that which is. A case has been put of votes received in contravention of a State law, after the time fixed for receiving them, [see the case of David Bard, of Pennsylvania,] and it has been said that these votes ought not to be received. Why? Because the time for holding elections being expressly vested in the State Legislature in the first instance, and Congress not having changed the prescribed time, the State regulation must prevail. But let the case be pursued further: suppose such votes are not only received, but included in returns made to the Governor; he is not to judge of the legality of the votes given; the State law only directs him to count up the votes returned; whether they ought or ought not to be received, he cannot judge; of this the House is the judge. He cannot receive evidence out of the returns; he, therefore, counts up the votes, proclaims the person having the highest number, and the returns are forwarded to this body. They are in due form, but votes appear to be admitted, which, by the law of Georgia, ought not to have been admitted. Is the House *concluded* by this return? Are they not, on the contrary, empowered to go out of it, and receive evidence of the fact that such improper votes were admitted? None will deny it. Further, suppose the presiding officer to have refused votes offered in time; suppose he had refused all the votes given for a candidate in several counties, the Governor could not pay any attention to these votes, for his certificate must be founded exclusively on the votes returned to him; he would be obliged, therefore, to certify as duly elected the person having the highest number of such votes, although it

1863.  
9th Congress,  
1st Session.

Views in favor  
of the commit-  
tee's report.

might be proved that the suppressed votes, if counted, would have given the highest number to another candidate. Could not the House, in this case, go out of the returns of the Governor, and allow the votes fairly given to be counted? In the election to be affected by such omission or neglect? Clearly not. In the present case, the votes in question, according to the law of Georgia, were lawfully given, and ought to have been returned. Had that law been observed, they would have been returned. In one respect only was there a neglect of it. Can that, then, be said to be a violation of the law of Georgia, which consists in giving effect to its provisions where they have failed to be observed? The great principle in judging of elections ought to be, that the will of the people fairly expressed shall govern. And that construction of the constitution and laws of the United States ought to prevail, which consists in giving effect to good votes, rather than destroying them. This is the principle of the report.

The adoption of a hostile principle would be to sacrifice the substance of election to its mere shadow. The suggestion that the principle of the report is calculated to alarm the jealousy of the States, is ideal. The judging of the election of members is a joint authority, residing in the States in the first instance, and ultimately in this House. If the controlling power does not reside here, it resides nowhere; there is a blank in the Government. It cannot reside in Georgia, for the power is not concurrent; and if not here, the States must inevitably submit to every irregularity that may be practised by subordinate agents. It has been said that the law of Georgia is in force, but it can have no force at the expense of the constitutional power of the House. But was that law complied with? If so, the present contest would not exist. It was true that the general principle is a sound one, which separates executive, legislative, and judicial power. This might be an argument for the institution of a special tribunal for the trial of contested elections; but it is an abundant answer to show that this has not been done; but that, on the contrary, the constitution of the General Government, as well as the constitutions of the several States, have made the legislative bodies judges of the elections of their members.

The resolution that C. Mead is not entitled to his seat was then passed by a vote of 68 to 53; and Th. Spaulding admitted by a vote of 66 to 52.

Mr. Dawson, from the Committee of the Whole, reported the agreement of the committee to the resolution contained in said report; and on the question that the House do concur in said report, a division was called for, and the question was taken on the following words:

"Resolved, That Cowles Mead, returned to this House as a member thereof from the State of Georgia, is not entitled to a seat," and passed in the affirmative; yeas 68, nays 53.

The question was then taken on the second member of the resolution,

1806.  
9th Congress,  
1st Session.

“And that Thomas Spaulding is entitled to a seat in this House, as a Representative of the State of Georgia,” and passed in the affirmative; yeas 66, nays 52.

Petitioner admitted to his seat.

And thereupon the said Spaulding took his seat, &c.

## CASE XXV.

*MICHAEL LEIB, of Pennsylvania.*

[A petition impeaching the return of any person as a member of the House, ought to state the grounds on which the election is contested, with such certainty as to give reasonable notice thereof to the sitting member, and enable the House to judge whether the facts, if true, be sufficient to vacate the seat.

Evidence ought not to be permitted of any fact not substantially averred in the petition.]

JANUARY 8, 1806.

The petition in this case was signed by John Douglass, chairman of a committee of sundry electors of the first district of Pennsylvania, and its purport was to pray the House of Representatives to appoint a commission to sit in Philadelphia, for the purpose of investigating the election of Michael Leib, returned as a member of the House from that district, and, if the same were found illegal, that a new election might be granted.

The report of the committee is as follows, to wit:

“A petition against the election of any person returned as a member of the House of Representatives ought to state the ground on which the election is contested, with such certainty as to give reasonable notice thereof to the sitting member, and to enable the House to judge whether the same be verified by the proof, and, if proved, whether it be sufficient to vacate the seat; and the petitioner ought not to be permitted to give evidence of any fact not substantially alleged in his petition.”

Report of the  
Committee of  
Elections.

“In the present case, the petition contains no direct or specific charge of any illegality in the election. The only allegations are general and indirect; that is, by a history of the proceedings of certain meetings and committees of electors,

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\* In the British House of Commons, where the contest depends upon the legality of the votes given, a list of the voters excepted to, must be left with the Clerk of the House, a certain number of days before the consideration of the petition; and the evidence is to be confined to the objections particularized in those lists. The sitting member may recover costs on frivolous or vexatious objections. [See statute of 53 George III, chap. 71, sec. 2.]

1833.  
9th CONGRESS,  
1st Session.

and by reference to a subjoined report of one of these committees, and the documents accompanying it, which documents appear to be seven *ex parte* depositions, not admissible in evidence, and not deemed proper to be considered as parts of the petition, by being generally referred to therein.\*

Petition rejected.

"The committees are of opinion that on such a petition there can be no satisfactory trial of the merits of the election in question ; and therefore recommend the following resolution :

"*Resolved*, That the petitioner have leave to withdraw his petition, and the papers accompanying the same."

The House immediately took the resolution into consideration, and agreed to the same, without debate or division.

\* IN PARLIAMENT.

John Luttrell, petitioner, vs. Sir Abraham Hume and Wm. Joliffe, Esq.

October 31, 1775, petition presented, setting forth that at the last election of members to serve in Parliament for the borough of Petersfield, Sir Abraham Hume, Baronet, *high sheriff for the county of Hereford*, William Joliffe, Esq., and the petitioner, were candidates, and that the two former were returned as being duly elected ; and the petitioner goes on to charge that this election was brought about by bribery and corruption, &c. and prays relief to the petitioner.

The counsel for the petitioner insisted that Hume, being high sheriff, was *ineligible*.

The counsel for the sitting members denied that it was competent for the other side to go into the question of the supposed ineligibility of Sir Abraham Hume, as sheriff of Hereford, "because there was no express allegation or complaint on that subject in the petition."

The words "*high sheriff of the county of Hereford*," it was said, appeared in the petition as an addition, or *descriptio personæ*, and did not import an allegation that, because he was sheriff, he was *therefore* ineligible.

On consideration, however, by the committee, it was

"*Resolved*, That the counsel be not permitted to argue the ineligibility of Sir Abraham Hume as high sheriff of the county of Hereford, *the same ineligibility not being an allegation in the petition*." [See Douglas's Election Cases, vol. iv, case 25.]

By the Committee of Elections in Parliament,

"*Resolved*, That the evidence proposed to be given cannot be gone into, the matter not being alleged in the petition." [Douglas's Election Cases, vol. iv, p. 146.]

## TENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
D. R. WILLIAMS,  
MATTHEW CLAY,  
LANBERT,

Mr. BLAKE,  
STURGES,  
ELLIOT.

Mr. Williams and Mr. Blake having obtained leave of absence, Messrs. Marion and Kirkpatrick were, on the 26th of January, 1808, substituted in their places on this committee.

### CASE XXVI.

#### JOSHUA BARNEY vs. WILLIAM MCCREERY, of Maryland.

[The constitution of the United States having fixed the qualifications of members, no *additional* qualifications can rightfully be required by the States.

Where two members were to be chosen from a district, and the State law required that one of them should be a resident of the *town* of B, and the other of the *county* of B, such law was held by *the committee* to be repugnant to the constitution, and therefore void ; and the decision of the House seems to have affirmed this opinion.]

On the 30th of October, 1807, Joshua Barney presented to the House his memorial contesting the election of William McCreery, and making a claim, in his own behalf, to the seat occupied by him. By the report of the committee, made on the 9th of November, 1807, the facts appear to be as follows:

The committee report:

“ That, by an act of the Assembly of Maryland, passed in November, 1790, it is required that the member shall be an inhabitant of his district at the time of his election, and shall have resided therein twelve calendar months immediately before. Report of the committee.

“ By another act of the Assembly of Maryland, passed in November, 1802, it is enacted that Baltimore town and county shall be the fifth district, which district shall be entitled to send two Representatives to Congress, one of which shall be a resident of Baltimore county, and the other a resident of Baltimore city. Election law of Maryland.

“ That Joshua Barney is a citizen of Maryland, and has been a resident of Baltimore city for many years.

“ That William McCreery has been for many years a citizen of Maryland, and a resident of the city of Baltimore ; but that, in the year 1803, he removed himself and his family to his estate in Baltimore county ; that, from that time, though he himself has occasionally resided in Baltimore, yet Statement of facts.



1807.  
10th CONGRESS,  
1st Session.

Report of the  
committee.

he, with his wife and family, have not made the city their settled residence.

"That William McCreery states that his intention was, and still is, to reside with his family on his country estate in summer, and in the city of Baltimore in winter; but that, ever since he has removed his family to his farm, he has been obliged every winter, in the public service, to reside, and frequently with his family, in the city of Washington, which prevented him from removing his family, agreeably to his intention, to the city of Baltimore; but he resided himself in the city of Baltimore five or six days before the election; that he and his family were residing in the same situation, when he was elected to serve in the ninth Congress, that they were, when he was elected into the present Congress; that, however, not wishing to have been taken up as a candidate at the last election, he expressed to some of his friends some apprehensions that exceptions might be made on account of his constant family residence not being in the city of Baltimore.

"At the election in that district for the Congress now in session, Nicholas P. Moore had 6,164 votes; he is a resident in Baltimore county: and William McCreery, against whose right to a seat in this House objection is made on account of residence, had 3,559 votes; and Joshua Barney, who claims a seat in this House, and it is admitted is a resident in Baltimore city, had 2,063 votes; and John Seat, also a resident in Baltimore city, had 353 votes. The above statement of facts being admitted by the parties, further evidence was not required. No question was taken on the legal residence of William McCreery in the city of Baltimore.

Qualifications  
of members  
prescribed by  
the constitution,  
and cannot be  
varied by State  
legislation.

"The committee proceeded to examine the constitution with relation to the case submitted to them, and find that the qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the constitutional rules; but the State Legislatures being, by the constitution, authorized to prescribe the time, place, and manner of holding the elections, in controversies arising under this authority, Congress are obliged to decide agreeably to the laws of the respective States.

"On the most mature consideration of the case submitted to them, the committee are of opinion that William McCreery is duly qualified to represent the fifth district of the State of Maryland, and that the law of that State, restricting the residence of the members of Congress to any particular part of the district for which they may be chosen, is contrary to the constitution of the United States: therefore,

Decision of the  
committee in  
favor of the  
sitting member.

"Resolved, That William McCreery is entitled to his seat in this House."

On the consideration of this report in a Committee of the Whole House, a debate arose, and was continued several days, and terminated at length by the recommitment of the report to the Committee of Elections. That committee, on the 7th December, 1807, submitted an amendatory report, in which they recapitulated, nearly in the same words, the facts set forth in the preceding one, as far as the clause terminating with these words, "no question was taken on the legal residence of William McCreery in the city of Baltimore." The remainder of the report was left out, and the following inserted :

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10th Congress,  
1st Session.

"When the report was recommitteed, Joshua Barney alleged that William McCreery had declared himself not qualified to be elected, in terms that William McCreery refused to admit, and proposed to bring stronger proof against William McCreery's legal residence in the city of Baltimore. The parties went to that place to take testimony, which they have submitted to the committee ; which is substantially as follows :

Additional report of the committee.

"Joseph H. Nicholson, in answer to interrogatories propounded by Mr. Barney, viz.

Synopsis of testimony submitted.

"*First.* Did any, and what, conversation pass between you and Mr. McCreery, as to his eligibility as a Representative to Congress, or between William McCreery, in your hearing, and what did he say ?

"*Second.* Did William McCreery at any time, and when, to you, or in your presence and hearing, acknowledge or say that he had not a residence in the city of Baltimore, and did not consider himself eligible as a Representative to Congress ? &c.

"To the first Mr. Nicholson answers, that, in the autumn of 1806, about six or eight days before the election for members of Congress, and he, Mr. Nicholson, hearing that doubts were entertained whether Mr. McCreery would consent to be a candidate, and inquiring on that point, induced a conversation relative to the election. Mr. McCreery said he had very reluctantly consented to serve, if elected, and regretted that some other person had not been fixed on, as he had understood that some objections were made to him, on account of his residence in the country, and was apprehensive that this would induce many persons not to vote for him, whose support he would otherwise have had. On being asked by this deponent, whether, at this period, his residence was not the same as at the antecedent election, and expressing some surprise that the circumstance of his residence now, more than then, should be an objection, as it had been overlooked before, Mr. McCreery, among other things, replied, that he had always taken care to hold a legal residence in the city of Baltimore, and went on to state how he had done so.

"In answer to the second interrogatory, Mr. Nicholson said, that William McCreery did not at any time say to him,

1807.  
10th CONGRESS,  
1st Session.

Substance of  
testimony, as  
stated by the  
committee.

or in his hearing acknowledge, that he had not a residence in Baltimore city, or consider himself as not eligible.

"Edward Johnston, in answer to the same interrogatories, answers substantially as Mr. Nicholson had done, with this difference, that the conversation took place previous to Mr. McCreery's election to a former Congress; and further, Mr. Johnston says, it took place when himself, Mr. McElderry, and Mr. Dickson, waited upon Mr. McCreery, for the purpose of prevailing on him to become a candidate, when Gen. Smith accepted a seat in the Senate; when he appeared anxious to decline, and observed to them, that, as he intended to remove to the country with his family, he was apprehensive that he would not be considered as a suitable Representative, and informed them, at the same time, that he intended to keep a counting-house for transacting business, furnished with a bed and other conveniences for his accommodation. This deponent and others assured Mr. McCreery that his contemplated residence would be no objection, and urged and prevailed on him to become a candidate; and that no other conversation ever passed between Mr. McCreery and himself, or in his hearing, on that subject.

"Samuel Walker testifies that, in 1803, Mr. McCreery having contemplated residing a considerable part of his time in the country, and intending to rent his dwelling-house, he, the deponent, agreed to accommodate Mr. McCreery at his dwelling-house; and that Mr. McCreery's family has resided twice a year, since that period, either at the house of the deponent, or at the house of Hugh Neilson; and that the deponent still does reserve a chamber for his use.

"Being cross-examined, he cannot say at what time, or how long, Mr. McCreery and family resided in his house, &c. They resided as friends.

"Hugh Neilson testifies that Mr. McCreery with his wife and niece made his house their place of residence when they came to Baltimore, where Mrs. McCreery and niece frequently stayed two or three months before, and during the session of Congress; that Mr. McCreery frequently visited during that time, and Mrs. McCreery and niece commonly went to Washington in December or January; that Mr. McCreery made his house his residence when he came to Baltimore on business, but kept a bed, desk, &c. at the store occupied by James C. Neilson: and that the deponent is brother-in-law to Mr. McCreery.

"Alexander Nisbet testifies that during the election, and some days before and after it, Mr. McCreery boarded at Mrs. Dysart's boarding-house, and slept there one night, and the other nights in the counting room.

"James C. Neilson testifies that Mr. McCreery rented the store to him, but reserved to himself the right of putting up a bed in the counting room, and of keeping a desk in it; that he put up a bed and slept in it about a week preceding

the election, and two or three days after it; and that Mr. McCreery's desk, and a few other things, remained in it the whole time; but that, when Mr. McCreery left Baltimore, the deponent took down the bedstead, and put it in a room in that part of the house which was rented to Mrs. Dysart, and the mattress under the desk; that no other person slept there but Mr. McCreery; that he knows of no permanent residence Mr. McCreery had in Baltimore city.

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1st Session.

Statement of  
testimony, con-  
tinued.

"On the foregoing testimony the committee make no observation, but will lay the record of the testimony on the Speaker's table, and submit the following resolution:

"*Resolved*, That William McCreery, having the greatest number of votes, and being duly qualified, agreeably to the constitution of the United States, is entitled to his seat in this House."

Resolution sub-  
mitted.

When this amended report came before the Committee of the Whole House, the resolution with which it concludes was agreed to, with the exception of the following words, to wit: "having the greatest number of votes, and being duly qualified, agreeably to the constitution of the United States;" and on motion, in the House, to strike out these words, it was carried by a vote of 70 to 37.

Action of the  
House thereon.

The resolution being thus amended, by striking out those words, a motion was made by Mr. Randolph further to amend it by inserting after the name William McCreery, the following words, "having the qualifications prescribed by the laws of Maryland." This amendment was negatived by a vote of 92 to 8, and the resolution in the following form was then passed by a vote of 89 to 18, to wit:

"*Resolved*, That William McCreery is entitled to his seat in this House."

By the decision in this case, and in that of Mr. Mead, of Georgia, preceding, it seems to have been settled that the States have not a right to require qualifications from members, different from, or in addition to, those prescribed by the constitution. The law of the State was, in both cases, set aside; and though it was alleged, in the case of Mead, that a compliance with the Georgia law, regulating returns, was, by the act of God, rendered impossible, yet it is obvious, from the report of the committee in his case, that that circumstance did not determine them in their decision, for the fact on which that allegation was based was not legally proved, and all evidence conducive to the proof of it was excluded. In the present case, the constitutional question was amply discussed.

The following voluminous debate, which took place in Committee of the Whole House on the report of the Committee of Elections, shows the importance which was attached to the principle involved in this controversy, and will elucidate more clearly the grounds upon which the final decision was given in favor of Mr. McCreery.

1857.

20th CONGRESS,  
1st Session.Debate on the  
report of the  
committee.Speech of Mr.  
Sturges in fa-  
vor of the sit-  
ting member.

Mr. STURGES said that the report, now before the committee presented two questions for their consideration :

1st. A question of fact. 2d. A question arising under the constitution of the United States, or, in other words, from comparing the law of Maryland with that instrument. As he was one of the Committee of Elections, and joined in the opinion which was reported, he was saved the necessity (in consequence of the view they had of the question) of considering the question of fact. He would, however, make one observation respecting the question of fact, which was, that whatever declarations Mr. McCreery might have made, or whatever doubts he might have expressed previous to the election, as to his right of being a candidate, if he had been in an error, it could, upon no principle with which Mr. S. was acquainted, affect his right.

As to the second question, Mr. S. said he knew of no clause of the constitution, which could have a bearing of any importance upon it, except the second clause of the second section of the first article, which was in these words: "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." In this clause they found that the framers of the constitution had enumerated the qualifications of the candidate. He would answer that when the framers of the constitution undertook deliberately to enumerate the qualifications, it was presumable they meant that no others should be necessary. It was not by any means a necessary, but, as Mr. S. conceived, a forced implication, that, because the States were not prohibited in express terms, they did possess the right. The implication was, in his opinion, directly the reverse. But it had been said, and would undoubtedly be urged, though it had not yet been stated in the debate, that whatever powers were not expressly denied in the constitution to the States, or, in other words, what had not expressly been granted by the States to the General Government, was retained by the States. He acceded to the correctness of the position generally. But a distinction was to be observed in those cases where, from the nature of the subject, there was no incompatibility; where there was no clashing in the concurrent exercise of powers by the General and the State Governments, the principle would apply; but in those cases where, from the nature of the subject, there would be an incompatibility, the principle did not, and ought not to apply. For instance, in attending to the legislative powers granted to the General Government by the eighth section of the first article of the constitution, they found that Congress had the power "to lay and collect taxes." In this clause the same power was not denied to the States, and it was retained by them; but why? Because, from the



nature of the subject, there would, in its exercise, be no interference with the General Government. In the seventh clause of the same section and article, Congress have the power "to establish post offices and post roads." A power over the same subject was not in express terms denied to the States; but had the States a right to establish post offices and post roads? He answered, no. Why not? For the reasons and on account of the distinction he had mentioned: because, from the nature of the subject, were they to exercise the power, there would be an interference with the powers of Congress; and there would be a serious inconvenience, for it was desirable, and, indeed, indispensable, that there should be a uniformity in the laws regulating post offices and post roads. So in the case now before the committee. Should the States be allowed the power to determine the qualifications of the elected, more especially where they have the right to superadd after the constitution had enumerated certain qualifications, that incompatibility, that interference of powers, which he had mentioned, would exist.

1857.  
10th Congress,  
1st Session.

Debate, continued.

Speech of Mr. Sturges in favor of the sitting member.

Will gentlemen attend to the consequences of the doctrine they contend for against the acceptance of the report? If the States had a right to superadd, why might they not say, by law, that the candidate should have an income of \$10,000 per year? Why not, if they should think it expedient, apportion the number of Representatives to which they are entitled, among the different professions of the community? Why not say that a certain number should be physicians, a certain number lawyers, and a certain number clergymen? Why not say that the candidate should be an inhabitant of the particular State any number of years he pleases, say twelve, or any other number, although, by the constitution, a residence of seven years within the United States is sufficient? Why not say he should profess certain political principles? Why not that he should profess certain moral qualifications? Or, to come more nearly to the particular case now under consideration, if they had a right to restrict the residence to a particular town in the district, why not to a particular street in that town, or even to a particular house? Were gentlemen prepared to admit these consequences? Or would they say these were extreme cases? He asked them, on his part, to designate, on their doctrine, the line to which the States might go, and which they might not pass. He found there appeared to be an alarm excited as to the validity of district elections, as practised in many of the States. That question was not now before the committee: but respecting it, he remarked that the States had a right to adopt regulations relative to the "times, places, and manner of holding elections;" and it was not by any means clear that restricting the residence of the candidate within the district was not a right vested in



1807.  
10th Congress,  
1st Session.

Debate, con-  
tinued.

the States by the term "manner." Besides, the States had a right to send one Representative for every 33,000 inhabitants. Now, if the States had a right, by virtue of the power to determine as "to the manner," to say that a certain number of the electors included within a certain district shall vote together, it seemed to be reasonable that the candidate should also reside in the same district. But granting that the doctrine urged in favor of the report should be attended with the consequences which had excited the alarm, yet he trusted, if the argument was a sound one, as to the particular case now under consideration, that it would not be rejected.

Being, as he before observed, one of the Committee of Elections, and in the opinion of the majority, he felt it incumbent on him to assign the reasons for his opinion.

Mr. RANDOLPH said he had been informed by a member of the committee, yesterday, that the printed report was extremely defective. The report was not laid on his table till yesterday; and he did not think the members had yet had time to form their opinions on so momentous a question. He therefore moved that the committee rise.

Mr. SMITH remarked that this was a question which had never yet been decided, although very important. He wished the committee not to rise so soon; for time could not be more usefully employed than in discussing it.

Speech of Mr.  
Sawyer against  
Mr. McCreery.

Mr. SAWYER said that as the facts which had been reported by the committee did not go far enough to prove that Mr. McCreery was a resident of the city of Baltimore, as the laws of Maryland required, he thought they might be permitted to take it for granted that he was not, notwithstanding the committee have drawn an inference contrary to the evident tenor of those facts. In regard to the *ex parte* representation of Mr. McCreery, which they had thought proper to superadd to this special verdict, from which they were to argue the constitutional law, even if it were properly verified, it would add very little to the proof necessary to establish that qualification; because it merely stated that Mr. McCreery had expressed an intention of becoming a resident of the city of Baltimore, but had not carried that intention into effect, further than he could be said to do by a residence of five or six days. The only part therefore of the report of the committee which merited their attention, was that which involved the constitutionality of the Maryland law. As the second section of the first article of the constitution of the United States related to this subject, he asked that it be read for the information of the House. [Here the Clerk read that part of the constitution.]

By this article it appeared that the general qualifications specified are that a person, to become eligible to a seat in this House, must have arrived at the age of twenty-five years, have been seven years a citizen of the United States, and twelve

months a resident of the State from which he was to be elected; leaving, as might be naturally supposed, to the States respectively, the addition of such other particular qualifications as they might think proper to impose, not incompatible with those fundamental ones laid down in that article. This clause might be considered the text from which each State might make a practical commentary not at variance with the letter of it. But it was contended by the chairman of the committee (Mr. FINDLEY) that those positive qualifications assumed by that article of the constitution contained a negative prohibition to every State of the right of imposing any others. Mr. S. said he was not prepared at present to grant any rights under the constitution, but such as had been stipulated for by express provision. He should by no means consider himself justifiable in surrendering up one of the most essential rights of each State, and of his own among the rest, by mere implication. So far as an effective operation of this clause depended upon a latitude of construction, he was perfectly willing it should have it; but there was not the least necessity for such a construction in the case, because an inclusion of the condition of a residency in a State was not an exclusion of a residency in a district; and a State, by annexing the latter condition to the former, did not in any respect effect the full operation of that clause of the constitution, according to its sense, expressed or implied. There was no necessity under the most liberal construction of this article, to suppose that a residency in a State should supersede the necessity of a residency in a district. So far from the views which the framers of the constitution had being thwarted by a construction of the kind he contended for, it would be the means of more completely carrying them into effect, unless it could be supposed that a person's being better qualified than the constitution required, should disqualify him altogether; for undoubtedly the surest, and, in fact, the only way of becoming a resident of a State, was to become a resident of a district, for every State was composed of districts.

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1st Session.

Debate, continued.

Speech of Mr. Sawyer against the report of the committee.

But even supposing that they should be impeded in their progress by the difficulty which a construction either way would produce, in rendering a negative injury to the constitution, or a positive one to the States, still their doubts would be dispelled and their progress made easy by another clause in the constitution, and which was added for the express purpose of clearing up all doubts that might arise under its interpretation. It was this: whatever powers and authorities are not expressly delegated by the constitution to the United States, or necessarily arising under it, shall be reserved to the States themselves, or to the people. Now, he hoped that a mere commencement to exercise a certain power under the constitution was not to be considered as a complete termination of it, with regard to the States. A

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right could not be said to be delegated absolutely, which may be exercised conjointly. He thought, therefore, that he could lay it down as an undeniable rule, that the right which each State had to require a person to become a resident of the district for which he may be elected, was not delegated expressly by the constitution, for there were no words in it to that effect, neither did it flow from a necessary operation of any of its provisions; therefore, it must belong to the States themselves, or to the people.

It might as well be said that no State had a right to lay itself out into districts, as to say the constitution denied them the right to elect persons who must become residents of those districts. Every argument which went to show that this right could not be enjoyed by a State, went equally to prove that their mode of dividing States into districts, and the elections which were made to that House accordingly, were fundamentally wrong and unconstitutional; because those divisions were marked out as the only practicable mode by which persons could acquire that qualification which the State of Maryland in this instance, as well as most of the States in similar instances, had thought proper to create. This qualification the law of Maryland expressly stated to be, that one of the persons to be elected, from the district of Baltimore should have been a resident of the city twelve months immediately previous to the election. Mr. McCreery was not a resident of the city one year previous to the day of election, therefore he could not be entitled to a seat in that House. Independent of the right which the State of Maryland had to impose this qualification, in a general point of view, she had particular reasons for the application of it in this particular point. Baltimore was a rich, growing, commercial city, and her interests were too important to go unrepresented on that floor. But, in the exercise of that right, they might observe the utmost liberality on the part of Maryland, for she conceded the right to the county, exclusively, of appointing a Representative who was a resident of the county, at the same time she wished to enjoy a similar right. In other large commercial districts, they observed the representation was altogether from the cities. Philadelphia, for instance, enjoyed that advantage over the counties of her district, which her superior population afforded her, by sending three Representatives to this House. But Baltimore, by a spirit of magnanimity, was disqualified from the enjoyment of any other privilege than what was exercised by the county, though in a little time her increasing population would enable her to enjoy a similar advantage with Philadelphia. How little this moderation in the equal distribution of a favor deserved the total abrogation of it on her part, must readily appear, upon any grounds of common justice; but if it were not extended to her from the pecu-

liar hardships of her case, Mr. S. trusted it would be conceded to her, according to the political rights enjoyed and expressed by the State of Maryland. He was the more earnest in this case, because, while he advocated the rights of the State of Maryland, he felt for those of his own State, which might at a future period be jeopardized like those of the devoted city of Baltimore.

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The conclusion which he drew from the premises was this: the State of Maryland had a right to impose this qualification, because it was neither expressly delegated nor impliedly assumed under the constitution of the United States; she had exercised this right by declaring that the city and county of Baltimore should elect one Representative each. The county of Baltimore, in pursuance of this regulation, had given a majority of its votes to Nicholas R. Moore, and the city of Baltimore had given a majority of its votes to Commodore Barney, who, in his opinion, was as legally entitled to his seat as Mr. S. himself, or any other gentleman on the floor. The whole dispute rested between Mr. Moore and Mr. McCreery, who should obtain a majority of the votes of the county, leaving the city entirely out of view, as neither of them could represent her, not being residents therein. As the majority had fallen on Mr. Moore, he has been duly elected, and the county had no right to send Mr. McCreery here also; for if she could elect two Representatives, she could with the same propriety elect three or four, or a dozen, which would be absurd. He therefore hoped and trusted the report would not be agreed to.

Mr. RANDOLPH said he would withdraw his motion for the committee to rise, as he perceived gentlemen persist in debating the merits of the main question.

Speech of Mr.  
Randolph, in  
opposition to  
the report.

That House had never been called upon to make a more important decision than the one now proposed. He wished he was prepared for the discussion. He had scarcely run over the report of the Committee of Elections; but it was one of those questions upon which his mind had been so long unalterably fixed, that he could not refrain from the endeavor to warn the committee of the dangerous ground which they were invited to tread. In undertaking to decide upon the validity of the law of a State, they touched upon a subject which should never be approached but under the most imperious necessity, and where no shadow of doubt could hang upon their decision. It might be said that with the *reasoning* of the report they had nothing to do; it was the committee's reasoning, not theirs; that they acted on the naked resolution only. But it was obvious to the meanest capacity, that when the committee thought the fact of Mr. McCreery's residence in Baltimore so unimportant that no question was taken upon it, and grounded their resolution solely upon the unconstitutionality of the law requiring it, that House could not affirm the resolution without affirm-

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1st Session.

Debate, con-  
tinued.

Speech of Mr.  
Randolph,  
against the re-  
port of the  
committee.

ing, at the same time, the only point upon which the committee had decided in favor of the sitting member. What were they required to do? To declare the law of Maryland, long revered and obeyed, under which successive elections had been held, and never before questioned—to pronounce this law to be a dead letter, entitled to no respect, even from her own citizens, and to absolve them from all obedience to it? Was it matter of surprise that the members of the House were startled at an innovation so daring and so dangerous? He had laid it down as a principle not to be questioned, that Congress should never undertake to pronounce upon State regulations, but in cases too clear to admit a contest, and where the decision could not be evaded without manifest detriment to the public good. If he were called upon to establish a criterion, an infallible touchstone of the soundness of political principles, it should be made to consist of nothing so much as a sacred regard for the rights of the States. An enlarged and liberal construction of State rights was, with him, an indispensable requisite, and he could never give his confidence to a politician indisposed to such a construction. He viewed the proposed measure but as the commencement of a series, as the entering wedge. If they began with declaring one law of one State unconstitutional, where were they to stop? They might, they would go on (it was the natural tendency of power never to be satiated as long as there was any thing left to devour) until the State Governments, stripped of all authority, rendered contemptible in the eyes of the people for their imbecility, and odious for their expense, mere skeletons of Governments, the shadows of their former greatness, should be forever abolished, and a great consolidated empire established upon their ruins. Mr. R. looked forward to such an event as the death warrant of the existing constitution, and of the people's liberties. If they wished to preserve the constitution, they must learn to respect the rights of the States, and not bring the whole artillery of the Federal Government to bear upon them. In such a contest, the States must fall, and, when they did fall, there was an end of all republican Government in the country.

His view of the  
constitutional  
requisitions.

The second paragraph of the second section of the first article of the constitution had, to his extreme surprise, been construed by the Committee of Elections as restricting the States from annexing qualifications to a seat in the House of Representatives. He could not view it in that light. Mark the distinctions between the first and second paragraphs. The first is affirmative and positive. "They shall have the qualifications necessary to the electors of the most numerous branch of the State Legislature." The second merely negative. "No person shall be a Representative who shall not have attained the age of twenty-five years," &c. No man could be a member without these requisites; but it did



not follow that he who had them was entitled to set at naught such other requisites as the several States might think proper to demand. If the constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally run thus: "*Every person* who has attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives." But so far from fixing the qualifications of members of that House, the constitution merely enumerated a few *disqualifications* within which the States were left to act. It said to the States, you have been in the habit of electing young men barely of age; you shall send us none but such as are five and twenty: some of you have elected persons just naturalized; you shall not elect any to this House who have not been seven years citizens of the United States. Sometimes mere sojourners and transient persons have been clothed with legislative authority; you shall elect none whom your laws do not consider as inhabitants. Thus guarding against too great laxity in the State regulations, by general and negative provisions, leaving them, however, within the limits of those restrictions, to act for themselves; to consult the genius, habits, and, if you will, the prejudices of their people. The first paragraph which he had read was positive and affirmative. By it, *every* person having the qualification requisite to an elector of the most numerous branch of his State Legislature, was entitled to vote for members of the House of Representatives. Yet, nevertheless, the qualification rested with the State. They might make it a part of the qualification of an elector, that he should reside within his district, county, or borough. Would it not be absurd to say that a man might take a seat in that House, who, at the same time, was not qualified to vote for a member of it? It had always been supposed that the elected should possess higher qualifications than the elector; yet here it would be entirely reversed. And why should it be supposed that whilst the constitution had vested in the State the greater power, that which was most capable of abuse, the unlimited right of prescribing the qualifications of the voter, it had denied to them, by a forced implication, the right of prescribing the qualification of the person voted for, having respect, however, to the disqualifications enumerated in it? The construction of the constitution, for which he had contended, was so obvious and natural, that it had been adopted by the States, and acted upon from the commencement of the Government, without any man dreaming of, or starting an objection to it. And the uniform practice of near twenty years, and the laws of the States in which the practice originated, were to be overturned at once, with as little ceremony as they would

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1857.  
19th Congress,  
1st Session.

Debate, con-  
tinued.

Speech of Mr.  
Randolph, in  
opposition to  
the report of  
the committee.

change one of their rules. If the doctrine of the Committee of Elections be sanctioned, Mr. R. said he did not know by what authority he himself could claim his seat. The law of Virginia, under which he held it, was equally unconstitutional with the law of Maryland. Indeed, it might be demonstrated, perhaps, that we had been living for years under an unconstitutional Government. Laws could not be valid which were passed by persons unconstitutionally elected. We should rip up the Government to its very foundations. The State of Virginia appointed her electors by a general ticket, (to keep out the heathen,) but each elector was to come from a particular district, notwithstanding twenty-four separate districts sent twenty-four electors by general ticket. If the State had no right to prescribe that the elector should be a resident of his district, the President had been unconstitutionally elected, in the first instance, by the electors, and in the second by members of that House voting by States, which members themselves had no right to their seats, the law under which they were appointed being null, void, and of no effect. Were gentlemen prepared for such conclusions as these?

Mr. R. said that a gentleman from Maryland had obliged him by calling his attention to that article of the constitution which enjoins that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Now, if it were laid down as a principle that the State had no right to require the residence of a member of that House within his district, the whole representation of Maryland might be taken (as they would be taken) from the town of Baltimore. Transient persons from other States, happening to arrive at Baltimore on the day before the election, who, if elected, would declare their determination to become permanent residents, might be returned as members of that House, and must maintain their seats under this decision. The House of Representatives would become a mere shadow, a mockery of representation; not such as the people were attached to, in support of their claim to which they had bled, but such a representation as an English lawyer allowed us to possess in the British House of Commons, when he discovered that the different grants in America being held as part and parcel of the manor of East Greenwich, all the colonies were represented by the knights of the shire for Kent. He believed they would possess just as much knowledge of the interest of their constituents in the one case, as had been exhibited in the other, and would demonstrate the same sort of care of their persons and purses. Mr. RANDOLPH said he held residence within the body of the county or district, to be of the very essence of representation. To be a good Representative, a man must not only reside among the people, he must be one of them, bound to them by every tie of habit, interest, and affection; not a

stranger, having no common feeling with them, known to them only by report, and imposed upon them by cabal, intrigue, and corruption.

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1st Session.

He believed there were no gentlemen of that House who had maintained a more uninterrupted harmony with each other, than that which subsisted between himself and the two gentlemen from Baltimore, (Messrs. Moore and McCreery.) Their whole intercourse had consisted of an interchange of civilities and courtesies. But this could not affect his opinion upon the present question. But whilst he thought Mr. McCreery certainly, and Mr. Moore *possibly*, not entitled to a seat, he could not agree with a gentleman from North Carolina, that Mr. Barney was duly elected. He would never consent to a man's sitting in that House upon the votes of a minority of the qualified electors of his district. He respected the rights of the people not less than the rights of the States. If a majority of the electors had voted for an unqualified person, believing him to be qualified, he believed the election should be set aside, and it should be put into the power of the people to send the man of their choice, who should be duly qualified. Mr. R. said that the votes not being given in exact conformity to law, perhaps the whole election should be set aside ; but he inclined to the opinion that Mr. Moore was duly elected as the county member ; that the votes given to Mr. McCreery were under the idea that he still continued a resident of the city ; that, being unqualified, his seat should be vacated, and a new writ issued to fill the vacancy.

Debate, continued.

Speech of Mr. Randolph, in opposition to the report.

If the report of the Committee of Elections should be affirmed, it would be an era in the history of this Government. For the first time, and when the nation was supposed to be under the guidance of men supposed to be friendly to the interests of the States and the people, the law of a State was to be declared unconstitutional. Before the committee undertook to pronounce this sentence, to set this awful precedent, it behooved them to pause and consider well. This decision, said Mr. R., will not be final. It will be but the forerunner of a long series of acts, abrogating the laws and usages of the States, endeared to the people by habit, and sanctified by reason. Before you enter upon this fatal act, be you well assured that the right is indisputably your own, and that you are called upon to exercise it by considerations which it would be criminal to resist. Beware lest, whilst you proudly assert your power, you do not meet the reprobation of the great body of the American people.

Mr. J. CLAY felt as high a respect for the rights of States and citizens as his friend from Virginia ; but at the same time differed from him as to the construction of the constitution. It was true that the constitution was not affirmative ; it was true that it decided the qualifications of Re-

Speech of Mr. J. Clay, in reply.

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Speech of Mr.  
J. Clay, in sup-  
port of the  
committee.

representatives in vague terms. The constitution said, "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen." Would his friend from Virginia say that the States had a right to narrow this ground? He believed not. The case was precisely the same with respect to the election of the President. "No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of the constitution," &c. He presumed that mere transient persons passing through a State, or residing in a State for a short time, could not be elected.

If the Legislatures of the States had no constitutional right to narrow the qualifications, they had no right to superadd to them.

While up, he would notice an error which the gentleman from North Carolina had fallen into, as to Philadelphia having three Representatives; there was one from the city, one from the county, and one from the county of Delaware; this, it was true, did not detract from the merit of his reasoning, but still it was an error. There was another argument of the gentleman, which deserves consideration. It was, that a person might be elected who was not a resident of the district, and who was not entitled to vote as an elector. He believed that an instance of this kind had occurred in the representation from Pennsylvania; and, perhaps, it would be admitted that although, in Virginia, none but freeholders vote at elections, a man might be a member of that House, and not a freeholder. This had been said to be the first case in which the rights of the States had been tried on that floor. The committee would recollect that, in the first session of the ninth Congress, Cowles Mead was returned as a member of that House; the election was disputed, and Mr. Spaulding was declared by this House to be duly elected. Mr. Mead was returned as elected under a positive statute of the State of Georgia, which directed that the returns should be made in a certain time, and that all the returns made after that time should be void. What was the decision of the House? That no State had the power of making laws, to decide upon the returns of members of Congress. If it were decided that the States had not a right to interfere with the returns, how much more clear was it that they could not interfere with the qualifications.

The constitution of the United States gave to the people the right of making an election of members of Congress from all the inhabitants who were within the State. He believed the question involved the liberties of the people. If they decided the State had a right by law to add to the qualifications of Representatives established by the constitution, they

decided that the right of the people to choose out of the whole State might be taken away, and the liberty of election thus abridged.

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Mr. SMILIE said he would not detain the committee long. The gentleman from Virginia seemed to be exceedingly warm with respect to the rights of the States as interested in the pending decision. With respect to the rights of the States, nobody who knew him ever doubted his opinion. When the constitution, which he held in his hand, was adopted by the State of Pennsylvania, because it encroached too much on the State rights, he had voted against it; his country had decided otherwise, and it was now become the law of the land. He had taken an oath to support that constitution, and however favorable he was to the rights of the States, he must adhere to that oath. He would make one preliminary remark; that there was a principle in a republican Government of as much importance as any other, as respected the safety of the Government, that the qualifications of the people elected should be firm, steady, and unalterable. If, by rejecting this report, they sanctioned a contrary principle, they could not tell how they might be represented at a future time. By the first clause of the second section of the first article of the constitution, (to which Mr. S. referred,) it was fixed with a precision which could not be controverted, what were the qualifications of voters; with respect to residence, could any thing be more precise than the provision contained in the second clause of the same section? Now, if they rejected the report of the Committee of Elections, they would say that the States might abridge those qualifications which the constitution provided. By the constitution of the United States, every citizen having the qualifications pointed out in that instrument, was qualified to serve as a member of this House. If they rejected the report of the committee, they would say that persons, although possessing the qualifications laid down by the constitution, could not be entitled to a seat. Had they a right to do it? Mr. S. said there had been a good deal said about negative or positive declarations in the constitution. Would the gentleman say that the States had a right to pass laws of naturalization contrary to those of the United States, and to the provision of the constitution which directed that they should be uniform? Many articles in the constitution pointed out the same principle.

Debate, continued.

Speech of Mr. Smilie, in favor of the report.

But dangers had been talked of with respect to the States, if this report were adopted; Mr. S. thought dangers of more magnitude might arise from its rejection; he believed that if they allowed to the State of Maryland the power of abridging these rights, it would be the most unlucky event that had taken place since the institution of the Government; he hoped the contrary.

Mr. FISK said there was one part of the constitution applicable in the present discussion, which had not been noticed.

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tinued.

He alluded to the fourth section of the first article: "The times, places, and manner," &c. Mr. F. would only ask the gentleman from Virginia, who had so ably defended the right of the States, if the power of Congress was not coequal and coextensive with that of the States. Congress might alter and prescribe the rule of elections so far as respected the time, *manner*, and place. If the gentleman contended that the States had a right to fix qualifications, he must also admit that Congress had the same right.

Speech of Mr.  
Randolph.

Mr. RANDOLPH said that, lest he should be unable to attend the next day, he would, before the committee rose, suggest, more particularly to the members of the Southern States, one of the consequences which might flow from the construction of the constitution contended for by his friend from Pennsylvania. He knew the temper of that gentleman's mind so well, that if, upon a more mature consideration of this subject, he should see the fallacy of the position which he had advanced, he would have the candor to retract it; and he felt such confidence in the excellence of his friend's understanding, and the purity of his intentions, that he did not despair of his conversion. On a former occasion, when a bill to prevent the introduction of Maroon negroes from St. Domingo into the United States was pending, its most important provisions were opposed and defeated, on the ground of its interfering with the established privileges of the people of color in certain States, who might be, and in fact were, mariners. They were then told, and no doubt truly, that the laws of a certain State knew of no distinction amongst its *citizens*, and gentlemen opposed as infringing the rights of their *constituents*. Let this fact be taken in connexion with that clause of the constitution which secures to the citizens of each State the privileges of citizens of the respective States, and then deny to the States the power of superadding any qualification, of color, for example. What was the undeniable inference, the monstrous and abominable conclusion?

Mr. R. reminded his friend from Pennsylvania, that the decision, in the case of Mr. Spaulding, turned not upon the invalidity of the act of Georgia. Her right to pass the law in question was never questioned; but it was in proof to the House that an act of God, the great hurricane, rendered it physically impossible to execute the law, and therefore it was dispensed with. It was an unforeseen interposition of Providence, which nullified the law of Georgia in that case. Suppose an officer should intentionally keep back his returns, or should be waylaid on the road by the partisans of the unsuccessful candidate, and robbed of them, would that deprive the person really elected of his right to his seat? Certainly not. The gentleman from Vermont had quoted a part of the constitution, which had nothing to do with this subject; which, in fact, in that day was nothing better than

a dead letter. Would the gentleman from Vermont move for a bill to regulate the time, place, and manner of holding elections in the several States for members to that House? After all that could be said, practice, long established practice, under the constitution, was the best evidence what the constitution was. Powers indisputably exercised by the States ever since its adoption, were as much departed from the General Government, and imparted to the States, as if especially delegated by the constitution itself.

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10th Congress,  
1st Session.

Debate, continued.

Mr. BRAN being about to offer an amendment, (but which was afterwards withdrawn, to make way for that offered by Mr. MONTGOMERY,) said he was too much indisposed at that time to enable him to enter fully into a discussion of the subject; but he thought it incumbent on him to state some of the reasons which induced him to move this amendment. Upon examination of the report of the committee, might be found these words: "The committee proceeded to examine the constitution with relation to the case submitted to them, and find that the qualifications of members are therein determined without reserving any authority to the State Legislature to change, add to, or diminish those qualifications," &c. It was for the purpose of objecting to the report generally, that it might not become a precedent, that Mr. B. made any observations; but it appeared particularly strange to him that the committee should have inserted these words in the report, when it was known to the committee that there was in the constitution a general reservation of all power not expressly delegated. The only question was, whether there be delegated to Congress a right to fix the qualifications of its members, or whether the States had not a right to alter or modify them. The words from which the inference in the report was drawn, were these: "No person shall be a Representative who shall not have attained to the age of twenty-five years," &c. These were certain qualifications which they had a right to require, and without which no person could be entitled to a seat in that House. The language was not such, according to legal construction, as to induce the House to say that the State authorities might not require other qualifications. If it had been thought by the framers of the constitution that the States had no right to diminish or alter qualifications, they would have said that Congress should have the sole power of fixing them. As this, however, was not material to the question, as it now appeared before the House, he would make a few observations as to the grounds on which he thought it properly rested. From the report, it appeared that the law of 1790, which required a candidate to be an inhabitant, required a residence of twelve months previous to the election; but that which required *one* to be an inhabitant of the town, and *one* of the county, did not say twelve months' residence, but simply provided that, at the time of the

Speech of Mr. Bibb.



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tinued.

election, he should be resident there. It did appear that, five or six days previous to the election, Mr. McCreery did reside there; consequently Mr. McCreery was an inhabitant according to the law of Maryland, and entitled to be elected. It was always with Mr. B., and would be, as long as he had the honor to retain a seat in that House, a general principle, from which he would never depart, except from the strongest conviction of its impropriety, that a member who was returned by a majority of votes of his constituents, should be entitled to his seat. Mr. B. could only vote otherwise, in a case where some bribery or corruption should be shown to have been used.

Mr. MONTGOMERY wished the gentleman to withdraw the amendment which he had proposed, in order that it might be substituted by the one he held in his hand to the same effect. Mr. BIBB consenting to withdraw it,

Mr. MONTGOMERY offered the following as an amendment to the report :

Amendment  
proposed.

“Whereas William McCreery was a resident of the city of Baltimore in the year 1803; that he resided partly in Baltimore city, and partly in the county of Baltimore, until the October election in 1804, when he was elected a Representative to Congress, in which capacity he served till March last, during which time he had a legal residence; and whereas it does not appear that he has since abandoned or forfeited that residence :

“Therefore, resolved, That William McCreery is entitled to a seat in this House.”

Speech of Mr.  
Alston.

Mr. W. ALSTON said that, although he might be perfectly satisfied with the reasoning of the amendment just offered, yet he was opposed to its adoption at present, because he thought the reasoning of the Committee of Elections much more proper. He would not question the correctness of the preamble just offered, but did not wish to vote for it, in consequence of the reasons which had been given in its favor. He saw no objection to voting for the resolution as reported by the Committee, and every member must be satisfied that, in voting for the resolution, they did not adopt the reasoning contained in the report; for that was the reasoning of the committee, and not of the House. If the fact of Mr. McCreery's residence in the county, instead of the city of Baltimore, had been stated in the report, and also that the law of Maryland was constitutional, he should yet have believed that he could have voted for the resolution, to the exclusion of every other part of the report, if he thought proper to do so, because the reasoning of a committee had no weight on his mind; the result was what he looked at. The committee had stated all the facts, and, in his opinion, had wisely avoided giving an opinion on the residence of Mr. McCreery. Every member was left at liberty to draw his own conclusions from the facts stated, without

being biassed by the opinion of one of the standing committees of the House: they all knew what effect the opinion of a standing committee had upon the House.

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Mr. A. said that he would, while up, offer a few reasons which had induced him to believe that no State had a right to add one single qualification to Representatives, or to diminish those laid down by the constitution of the United States. Once permit the States to depart from the straight line, and where would they stop them? If they were permitted to go one step, were any bounds prescribed in the constitution at which they could be stopped? That part of the constitution which had been read by many gentlemen, and which described certain qualifications, upon possession of which a person might be entitled to a seat upon that floor, contained no such restriction. Several States in the Union had passed laws upon this subject; the State of which he had the honor to be in part a Representative, had divided the country into districts, and provided that every person returned should have resided in the district for which he was elected at least twelve months previous to the election. But Mr. A. said he had always believed that had the people of one district chosen to elect a man from another district, possessing other qualifications as required by the constitution, he would be entitled to his seat. He had understood that the Legislature of Virginia had prescribed, among other qualifications, that no person should be elected a Representative unless he was possessed of a freehold estate. What might be the consequence of this? They might say that no man should be elected who did not possess 50, 1,000, or 10,000 acres of land; they might even prescribe the particular quality of the land, or its situation.

Debate, continued.

Speech of Mr. Alston, in favor of the sitting member.

The case from Georgia, of Mead and Spaulding, had been so ably argued by the gentleman from Pennsylvania, (Mr. J. CLAY,) that he would not dwell upon it; it was certainly a case in point. The Legislature of Georgia, in prescribing rules for conducting her elections, had said that the returns should be made within twenty days. How did the House act on this occasion, although there was a manifest violation of that law? The House, regardless of that law of Georgia, decided that the member elected should be entitled to his seat. This was a case stronger than the present, and in deciding on it the House had decided against the right of States even to regulate the manner of elections, which was more than he contended for.

See ante, p. 157.

The constitution of the United States, when speaking of the qualifications of electors of President and Vice President, varied in its language from that part which spoke of Representatives, because it says "each State *shall* appoint," &c. The constitution, in speaking of Representatives, had neither said the States *should* assign qualifications, nor that they *might*; he therefore thought that any person possessed

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Debate, con-  
tinued.

Speech of Mr.  
Rowan, in op-  
position to the  
petitioner.

of qualifications, as required by the constitution, and who was duly elected, was entitled to his seat, notwithstanding State regulations.

Mr. ROWAN was opposed to the amendment, because it threw behind the screen the main question, on which the House ought to come to a decision. It was the first case in which a decision would be had, whether the State authorities could be blended with those of the General Government, or whether each should exercise its respective authority. He held it essential to the sovereignty of the Union that the National Legislature should, whenever the question came legitimately before them, decide upon the constitutionality of any law: without such an exercise of authority, the national sovereignty was prostrated, and must ultimately fall. It seemed to him essential to the wellbeing of the nation that the energies with which that sovereignty of the Union was vested, should be retained to itself, and should not be encroached on by the State authorities. As the whole to a part, so was the national existence to that of the State authorities; but while they preserved the national existence, they should be particularly careful of the attributes of the State authorities, one of which was now under consideration. Had the Legislature of Maryland exercised a power permitted them by the constitution? If they had, should the sovereignty of the Union acquiesce in it? Should they acknowledge a principle which might hereafter assail it more vitally? No, for in this early period of the Government a case has occurred upon which the right of each State can and ought to be determined as to the prerogative in question. The present is that case. A man had been elected, and had taken his seat in Congress from the State of Maryland: his election had been contested, because, said the applicants, the sitting member was not a resident of Baltimore, a part of the district from which he was elected. Had the Legislature of the State of Maryland the power of thus contracting the choice of the people? If they had the power of restricting the choice of Representatives as to place, why not as to other qualifications? They might say that no man was qualified to serve as a Representative in the Congress of the United States who was not a farmer, a mechanic, or of any other profession. Grant them the power of adding qualifications, and where would they fix a limit? The constitution did not provide against the introduction of a political test. The State Legislature might enact that no person should be a Representative who was not a federalist: how would the committee reconcile this with that part of the constitution which had undertaken to guaranty to the States a republican form of Government? If the Legislature determined that members from the State of Maryland should possess a certain property, that they should be worth 500 or 1,000 pounds, would it not be verging towards aris-

toeracy? If they were to say that all the members of the State should be chosen from the town of Baltimore, would it not appear absurd? And yet they had as much right to do this as to say that each member should be a resident of a particular district. The Legislature was only authorized by the constitution to say that they should reside in the State from which they were elected.

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Debate, con-  
tinued.

Speech of Mr.  
Rowan. Denies  
the right of the  
States to fix  
qualifications of  
members.

But admitting that the right rested with the States, ought not qualifications always to be settled by convention? Where was the use of the constitution if the Legislature of a State could fix or vary qualifications? It seemed then that it was proper for the convention of the United States to fix unalterably the proper qualifications. If they had not done this, it would have seemed to Mr. R. doubtful whether the power resided in Congress or the States. Was it proper that a part of the Union should have the sole and paramount power of fixing qualifications for members of the Union? In doing this, did they not legislate for other States? And if this were the case, should not Congress interfere? Mr. R. supposed that those gentlemen who advocated the right of State Legislatures to fix qualifications, would be shocked were Congress to assume that right; and yet Congress possessed every capacity from the people to legislate on this subject that the State of Maryland possessed. It would be somewhat better that they should, because they would be supposed to know the wishes of the Union better than so small a part of it as a State. He therefore contended that the qualifications for a Representative to Congress were unalterably fixed by the convention; the constitution was the place to look for them, and not the statute book, for if it were, they would float on popular caprice.

But to ascertain whether the constitution did fix these qualifications or not, Mr. R. said he would request the attention of the committee to a few arguments. It was a principle in law that every thing which the parties who wrote, had said in a writing, was all they intended to say. If they had said nothing, it was presumed that they had reserved it for further consideration; but if they said any thing on a subject, it was supposed they had said all they meant. Now the framers of the constitution had prescribed certain qualifications; if they had intended that any other should be necessary, they would have said so. In the preceding clause they had given to the State sovereignties the right to fix the qualifications of electors: "the electors in each State shall have the qualifications requisite for the most numerous branch of the State Legislature." Here they have thrown upon the State Legislature the whole power to affix qualifications to the electors, as well of the members of Congress, as of the President and Vice President: not so as to the elected; it might have been unfortunate if they had; the

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Debate, con-  
tinued.

Speech of Mr,  
Rowan, in sup-  
port of the  
views of the  
committee.

different interests of the different States would have assigned different qualifications. In such circumstances, could any unanimity have been expected? No. It had therefore forcibly obtruded itself upon the people, that they should affix permanent qualifications, which were only that a member should have arrived to the age of twenty-one years, have been seven years a citizen of the United States, and should be an inhabitant of the State for which he should be chosen. No power had been given to the State sovereignties to superadd qualifications; if they had left this power with the States, this Government would not have been a Union, but a distraction. But if the Legislature may annex additional qualifications to the members of the House of Representatives, so they may also to the Senate. The members of the Senate were considered as particularly the representatives of the States, the members of this House as representatives of the people of the Union—distinct interests. And if the House decided that the State of Maryland did possess power to annex qualifications, they decided against the liberties of the people, for the members who composed the United States convention were from the people, they performed the functions of representatives of the people, and of representatives of the State sovereignties. To the State sovereignties they granted additional rights, and others they reserved, among which last was the power of choosing the Representatives of the people, subject only to the qualifications of residence, &c. The State of Maryland had waived the qualifications thus fixed, and confined the residence of the member from that State to Baltimore, a particular part of his district.

Mr. R. said he was the more anxious on this question, because it appeared that other encroachments had been made on the constitution. A gentleman from North Carolina had said that in his State the residence was confined to the respective districts from which they were elected. It was therefore high time the people should rectify these errors, or he agreed with the gentleman from Virginia, though from different causes, the constitution would soon become a dead letter; he thought it therefore important to determine whether States were to the Union what counties were in relation to the States. He believed that, as to the purpose of electing members to the lower House of Congress, the States were to the Union what counties were to a State, and that districts in a State were to that State what election precincts were to a county, all for the convenience of the electors, and not in abridgment of their rights. We should be shocked at a law requiring a county representative to reside in a particular one of its several precincts; not less improper is it to require that the Representative in Congress from a State should reside in a particular part of any one district of



the State. The people cannot be confined in their choice of a Representative within narrower limits than those of the State.

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Mr. R. said the House ought to go on constitutional grounds; and he held it, and was willing to express it as his opinion on the question, that persons voting for a member to Congress had a right to vote for a candidate residing out of their district as well as in it, and that, if a man out of a district had a majority of votes given in that district, he was duly elected a member of that House. Suppose the Legislature of Maryland, instead of determining that one Representative should be chosen from the city of Baltimore, had declared that all the Representatives of the State should be chosen from Baltimore. If she had power to confine one to a particular district, why not all? If they permitted the Legislature to contract the choice within a district, why not to a particular part of it? He was, therefore, impressed, that, in advocating the doctrine he laid down, he was advocating the rights of the people; for it appeared that the rights of the electors and the elected were invaded at the same time. On one side they had encroached on the liberties of the people to be chosen, and on the other side contracted the latitude of their choice.

Debate, continued.

Speech of Mr. Rowan, in favor of the report of the committee.

Mr. R. said that he believed it was one of the most prominent attributes of sovereignty to extend its power; that each sovereignty was politically, though not physically, of equal power; that sovereignty, whether of the States or the Union, had an equal bias to self-extension. While they guarded against encroachments on State sovereignties, they must not let them encroach on the sovereignty of the Union. The rights of each consisted in the true observance, on the part of each, of the rights of the others. The State of Maryland had encroached on the rights of the people of the Union; for it was a particular right of the sovereignty of the Union to fix qualifications for Representatives to Congress, as they are fixed in the constitution, which right the Legislature of Maryland had contravened.

He was struck yesterday by the force of an argument of the gentleman from Pennsylvania, who had cited the naturalization law in illustration of the present case. Would it be permitted to any State to enact laws regulating this matter after Congress had legislated upon the subject? He presumed not: for if one State might, so might another, and they would not concur; hence a want of uniformity would result. Now, it seemed to Mr. R. that if a State could not legislate in the latter case, they could not in the former; they were subjects on which uniformity was at least equally important. On a uniformity of qualification for members of that House depended every thing dear to the nation; it was a point on which the people of the Union ought to be most jealous, and the last on which they should be assailed. He should vote for the resolution of the Com-



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Debate, con-  
tinued.

Speech of Mr.  
Rowan.

mittee of Elections, but he wished the subject to be divided, that separate questions might be taken on each point. He was unwilling that there should be any thing connected with the constitutional point, that not a doubt might remain on its decision. The evils which had been represented yesterday as likely to result from this decision by the gentleman from Virginia, whose talents and motives he had always been in the habit of revering, Mr. R. thought, bore no proportion to evils which might result from a contrary decision. He had said that transient persons might be elected members of that House: the confidence in this particular was reposed with the people; they were to take care that a man who did not possess constitutional qualifications should not be sent there; and if it were discovered by the House that one of its members was not constitutionally qualified, his seat would be vacated.

Mr. R. observed that the doctrine laid down by some gentlemen, that the electors and elected should possess similar qualifications, did not seem to him to be the sense of the constitution, for it had annexed different qualifications. Perhaps it would be good policy in the States not to annex qualifications even to an elector, which did not attach to the elected. It seemed that the State of Virginia had enacted that no person should be entitled to vote who was not a freeholder; and it was argued that, therefore, no person could be elected who did not possess that qualification, which was contrary to the sense of the constitution.

Mr. R. said he would therefore conclude with expressing an opinion in favor of the resolution of the Committee of Elections; and that he was convinced of the right of the House to determine on the constitutionality of a State law, when it came legitimately before them, as in the present case. Whilst he relied on the State sovereignties, he also revered the national sovereignty, as one without which the State sovereignties could not be preserved, and by which, if the State sovereignties were assailed, they could alone be rescued.

Speech of Mr.  
Johnson, in fa-  
vor of the re-  
port of the  
Committee of  
Elections.

Mr. JOHNSON said it was with reluctance that he submitted to the consideration of the committee a few remarks on this subject. It was not his wish, at this or any other time, to occupy the attention of the House unnecessarily. The importance and magnitude of the principles involved in this question might have been considered sufficient to have prevented a new member from rising at all; but the course which the argument had taken, and the form which the discussion had assumed, had alone induced him to express the reasons which would influence him to vote in favor of the report. It had been said that there was, on this occasion, a conflict between the State and federal sovereignties: he considered the State sovereignties as the great palladium against anti-republican tendencies and encroachments on rights; and while he retained a seat in that House, he

would, in any conflicting case, give the power contended for to the States. But on this occasion the question was on the federal constitution, and whether any State Legislature, or any other power of legislation, could add qualifications to any member of that House. He laid it down as a principle that every contraction of qualifications for Representatives was an abridgment of the liberty of the citizen. The power of adding other qualifications than those fixed by the constitution, would, in his opinion, be a breach of the right of suffrage. If the principles contended for in the constitution were not calculated to secure the liberties of the people, and a resolution to amend the constitution were offered, he should be the first to sanction it. But when they contended for an abridgment of the liberties of the people, as by this amendment, he should oppose it. He was in favor of the report of the committee. One single reflection on this subject had influence on his mind. The observations of the gentleman from Virginia had almost made him doubt whether to give a positive vote on this principle; but he was not satisfied that any Legislature of the Union had a discretion under the constitution to legislate on these important principles; he thought that discretion rested only with a convention of the people; he thought that any right to abridge qualifications was denied both to the State Legislatures and to the legislation of the Union. Was it not a principle of republican Government, that they should have well defined the qualifications of the electors and the elected? Should any power but the people themselves have a right to alter the qualifications required by the constitution, and then in convention only? Would any power less than a convention of the State of Maryland assume the right of adding a disqualification?

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Speech of Mr.  
Johnson, con-  
tinued.

The gentleman from Virginia had told them that the constitutional disqualifications were negative. There were three: that no person should be eligible as a Representative who shall not have attained to the age of twenty-five years; who had not been a citizen of the United States seven years; and who was not an inhabitant of the State at the time of his election. This clause of the constitution being negative, it had been said that the State Legislatures were not precluded from adding others: the reason for this negative expression was obvious. The people had a natural right to make any choice; and that would be an unlimited right, but for the constitution. Every rational being would be eligible by the people, if no disqualification were annexed; and it seemed to Mr. J. if there actually existed no disqualification, the people would exercise their right of choice with much prudence: it would be consistent with their natural liberty. It therefore appeared unnecessary for the constitution to have stated affirmatively who should be eligible, because all were so but those barred by the excep-

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Johnson, con-  
tinued.

tion ; an expression then of the negatives was all that could be necessary. There was a great distinction between the power of the people in convention, and the power of a Legislature growing out of a constitution, which the people had entered into in their sovereign capacity. The great object of the people in convention was for the purpose of fixing upon primary and fundamental rules and regulations, to give form and organic structure to the society and body politic : among those primary principles, none had been considered more important than those which fixed the qualifications of electors and the elected. The term of service and tenure of office were principles which had never been left to the power of legislation, because they were the basis, the foundation of our republican institutions.

Mr. J. said there were now in the Union seventeen States, and he would ask for a case in which these principles had been left in the power of any Legislature. They had in all cases been fixed by the people in convention. If in this instance disqualifications could be added, the same negative expressions ran through the constitution, as respected all other elective officers, the President, Vice President, and Senators, and other disqualifications could by the same rule be extended to them.

One word on the subject of the State sovereignties and Federal Government. There were many subjects in which they had concurrent powers. In those cases, Mr. J. said he would always decide in favor of the States.

Mr. Randolph's  
motion for the  
committee to  
rise.

Mr. Troup as-  
sented to the  
motion.

Mr. RANDOLPH moved that the committee should rise, in order to recommit the report to the Committee of Elections, to the end that the fact of residence might be ascertained.

Mr. TROUP most heartily gave his assent to the proposition. Ever since the report had been laid on the table, he had been solemnly impressed with the solemn import of the question submitted to the House for decision ; a decision which might yet be avoided if the facts were as stated by the gentleman from Maryland. He was averse to deciding it on constitutional ground, although, were the question of necessity before them, he should not hesitate about it. He felt himself embarrassed when called on to decide on a right exercised by States, and he thought the House trod on delicate ground, when, by adopting this report, they proclaimed to the world their own omnipotence. They ought to avoid, if possible, a decision on the rights which had been exercised by States. For this reason he should hope the committee would rise.

Mr. QUINCY did not understand the precise reason given by the gentleman from Virginia, for his motion that the committee should rise. He believed the gentleman was not present before the House went into Committee of the Whole, when a motion was made to recommit, in order to obtain further information. It was then stated that all the facts, in

the possession of the committee, were before the House. If the gentleman had no other view than this, he should vote against the motion.

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Mr. DESHA hoped the motion would prevail. The present was an all-important question, one on which he had not prepared himself to vote, and he wished to obtain time to deliberate on the subject.

Debate on the motion to recommit the report.

Mr. LOVE said he had indulged a hope that a recommitment of the report of the committee might have taken place, from a supposition that there were other facts attending the case, which, from the point on which the committee had decided, might, by them, have been deemed unimportant.

Mr. Love, in favor of recommitting the report.

The great respect, said Mr. L., which I feel for the political characters and talents of the members of the Committee of Elections, has given this report a very imposing influence on my mind; yet, however painful it is to me to differ in opinion with that most respectable committee, on this occasion I conceive my duty makes it indispensable that I should express my dissent from the doctrines contained in their report.

In discussing the great constitutional question I conceive to be involved in the report, I shall adopt the division which the subject seems naturally to require.

1st. Whether the right to legislate on the subject contemplated by the laws of Maryland, mentioned in the report, does not, of necessity, reside in some legislative delegation; and, if so,

2dly. Where does it reside?

I shall contend for the affirmative of the first proposition. The great object of Government no doubt is, to attain to that degree of political perfectibility, which, without invading the natural rights of men, shall be consistent with expediency and convenience. Is the power, then, contended for by Maryland, in the act of her Assembly, consistent with expediency, and no infraction of individual right? If it is, I presume it is included in the common and usual powers of legislation, and must be found to exist either in our State or General Government. The confusion that would be attendant on the mode of election, and the total want of any local representation, are too obvious to need comment. The right to legislate at all upon this subject, I had not until to-day supposed would be questioned; and I confess, although now denied, I have heard no satisfactory reason offered in support of such an opinion.

Forming, then, as I presume, a proper object of legislation, I will next proceed to inquire where, according to the nature of our civil institutions, it must be presumed to reside.

If it resides in the General Government, it must be admitted that, according to the nature of that instrument, it must be found to be expressly delegated. An argument to prove this position I should have presumed, at this time

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Love, in oppo-  
sition to the re-  
port.

of day, unnecessary. If there are any here who doubt this position, I would, in the first place, refer them to all writers on the subject of our political institutions; for all who speak on the subject, admit that the powers delegated to the Federal Government are to be taken strictly, and that nothing is considered as granted unless expressed to be so. I would next refer such gentlemen to the first section of the first article of the constitution of the United States, which is in these words: "All legislative powers herein granted shall be vested in a Congress," &c. And if a doubt yet remained that no powers were granted to the General Government, except those expressly enumerated, I would finally remind them of the provisions contained in the twelfth article of the amendments to the constitution of the United States, and in the solemn, emphatic language of the gentleman from Pennsylvania, (Mr. SMILIE,) invoke them to remember their oaths when about to decide this question.

But it has been argued, and such seem to be the principles on which the report is grounded, that the power to make laws, on this subject, is expressly vested in Congress; and in support of this position, different parts of that instrument are relied on. Let us examine those parts. The first mentioned in argument is in these words: [Here Mr. L. read the first and second paragraphs of the second section of the first article of the constitution.] Here no grant of power is to be found. I never before understood that a restriction in any instrument, which is in its nature negative, could imply a positive conveyance of a right, or that more was withheld than the negative, or exception expressed; on the other hand, it is a maxim of construction, as it respects our constitution, that no rights pass by implication.

Another part of the constitution which has been argued on in support of the resolution, is the fourth section of the same article; and something has been inferred from the latter part of this section in favor of the power, because it would seem that only a concurrent right is granted the States of legislating on the time, place, and manner of holding the elections. This right is not an exclusive one in Congress; and although I am not of opinion that any part of the constitution may, by *non-user*, become obsolete, according to a rule of construction which applies to laws, yet, I think, on another ground, that the supposition is correct, that this power vested in Congress may be considered as a dead letter, because it never will be acted on; for, before a regulation can be made in pursuance of it, such regulation must be concurred in by the other branch of this Legislature, who are the immediate Representatives of the States, in their political capacities, and who will, of course, guard their rights; and because, too, before such regulation would be carried into effect, it must receive, most probably, the Presidential approbation.

But it has been further argued that the right of enacting



laws on the subject which the law of Maryland contemplates, is vested in Congress under the fifth section of the first article of the constitution: the words are, "Each House shall be the judge of the elections, returns, and qualifications of its own members." And it seems to be presumed that, because we are to be the *judges* of those qualifications, we have, consequently, the right to constitute or enact the qualifications. The functions appear to me to be entirely distinct, as much so as the power of making the law is distinguished from the power of judging on it when made. One gentleman, indeed, the gentleman, I believe, from Connecticut, (Mr. STURGES,) has properly observed that we were acting, on this subject, in a judicial character, and in this opinion I concur.

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Speech of Mr.  
Love, continued.

We have been alarmed, from different quarters of the House, with the great dangers which would result to the Government, from admitting that the State Legislatures should have the right of enlarging the qualifications prescribed in the constitution for the elected; and some gentlemen have said that if the power exercised by the law of the State of Maryland is yielded to be in the States, they may super-add the age of thirty or forty to that of twenty-five, as fixed on by the constitution; while others have deprecated the exercise of those powers by the States, lest they might require that the residence of the elected should be confined to a particular street or house, or that he should profess particular political opinions. To all this kind of argument, but one kind of answer need be offered; and that is, that we must rely on the discretion of the State sovereignties to exercise this, as well as all their other powers, under the control of a sound discretion. Nor can I for a moment suppose that those powers, necessary to the proper management of our political institutions, are confided with less safety, or subjected to a greater risk of abuse from the State, than from congressional authority. I should, on the contrary, think that a power so necessary to be exercised, would be most safely confided, where the responsibility to the constituent was most sensibly felt. This is the case in a greater degree in the State Governments, than under the constitution of the United States. In the former the elections are annual in all the States, I believe, while the elections to Congress are biennial. Much less risk is certainly to be apprehended from the acts of seventeen or more distinct sovereignties, each of which is composed of as many members as constitute the National Legislature, than from the conduct of a Congress, consisting of members from distant and distinct parts of a widely extended empire, comparatively few in number, and whose peculiar interests might lead them to the adoption of measures inimical to the freedom of election. If the members of a State Assembly might be presumed to entertain designs of fixing their friends or themselves in office, by making an income of fifty thousand dollars per annum the qualification of a member, as the



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gentleman from Kentucky seemed to suppose, the danger would certainly be less, when the same power was confided to a body elected for the term this is. But why is so much to be apprehended from the exercise, by the States, of the power acted on by the Legislature of Maryland? Can we be afraid to trust the States with the exercise of this little power, with the most unreserved discretion, while they hold, under the express provisions of the constitution, powers so much more important? Do gentlemen reflect that in the hands of the State Governments, is the power to terminate, at will, the existence of one branch of this Legislature, and of another entire department of the Federal Government? Yes, sir, in the palms of their hands do the State sovereignties hold the being of the other branch of the National Legislature; and without their resuscitating breath, the Executive of the Federal Government must die, and be extinct forever. Good policy, as well as the happiness of us all, requires that we should endeavor to harmonize with the States. Let us avoid all collisions of authority; they may disturb the peace of us all.

In the opinion I have formed on this subject, I feel great confidence, from the uniformity of construction which the State Legislatures have put on their powers. In perhaps every State in the Union, have laws been enacted of a similar nature to that which is now the subject of consideration. In Virginia, I acknowledge there is such a law as the gentleman from North Carolina (Mr. ALSTON) has mentioned. It certainly goes further in principle than the law of Maryland. Yet I think it a wise one in securing to the people the choice of Representatives, whose interests are, in some measure, assimilated to their own. Fourteen or fifteen other States, I believe, have, many years ago, and some of them of a date perhaps coeval with the operations of the General Government, passed laws of a similar nature with that under discussion. When we find so many distinct, enlightened bodies as the State Legislatures are, simultaneously acting in the same manner, on the same subject, without any previous concert, I confess it strongly supports me in the correctness of the opinion I have formed.

Mr. RHEA, of Tennessee, and Mr. J. CLAY, wished the committee to rise, in order to a recommitment of the report to the Committee of Elections.

Mr. M. CLAY advocated the report, and opposed the recommitment. But if gentlemen wished the committee to rise, to give them further time to display their talents, he had no objection, though he must say he was averse to these long arguments, and would rather have one good vote than fifty bad speeches.

Mr. BLACKLEDGE wished for a division of the question, so as to ascertain the sense of the House on both the contested points.

Mr. GARDENIER was opposed to deciding on the constitutional question, as he thought it was not necessarily before the House. It did not interfere with his making up his mind, nor need it with others.

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The committee then rose, and obtained leave to sit again.

Debate in Committee of the Whole on the report of the Committee of Elections.

MONDAY, NOVEMBER 16.

The House being in Committee of the Whole, Mr. BASSET in the chair,

Mr. BIBB said that when he had spoken on this report on a former occasion, he was too much embarrassed by his ill health to go fully into the subject. It appeared to him to embrace two distinct questions. He was himself in favor of rejecting the report, and yet agreeing with the resolution which it recommended. In order to overcome the difficulty in which he found himself, he had proposed a resolution which he had withdrawn in order to make way for that proposed by the gentleman from Maryland, (Mr. MONTGOMERY,) which was also afterwards withdrawn. To effect his wishes, he now offered the following resolution :

Speech of Mr. Bibb, of Georgia.

“*Resolved*, That William McCreery is duly elected agreeably to the laws of Maryland, and is entitled to his seat in this House.”

Mr. B. said that it appeared there was a majority of the House in favor of the election of Mr. McCreery, but that there was a difference of opinion as to the reasons which should influence that decision. To avoid this inconvenience, it had been suggested by the gentleman from New York, (Mr. GARDENIER,) that it would be better to take the question on the fact of his election only, unconnected with the report of the Committee of Elections. If there were any other mode of getting over this difficulty, Mr. B. would not have proposed this resolution. The report now before them declared Mr. McCreery entitled to his seat, and assigned certain reasons for it. It had been said by a gentleman, whose opinions he highly respected, that they were now about to decide on the resolution, and not on the report. If Mr. B. could have believed this, he should not have wished the report to be amended ; but it appeared to him, that if ever hereafter a similar case should occur, by resorting to the public journals, it would be found that this decision had been made on the report of the Committee of Elections, who had given certain reasons for their opinion, and these reasons would certainly be considered as adopted by the House. He could see no escape from the difficulty, but by such a resolution as that which he had proposed ; for, if a decision were taken on that, and a majority were in favor of the sitting member, there would be an end to the business.

Mr. B. said, as he had offered this resolution, and stated the grounds on which it was founded, he would state some

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Speech of Mr.  
Bibb.

His reasons for  
sustaining the  
right of the sit-  
ting member.

of the reasons which had operated on his mind in its favor. A law had been passed by the Legislature of Maryland, some years ago, which directed that a Representative from the State should have been a resident of the district from which he was elected, and should have been so twelve months previous to the election. By another act passed since, the district of Baltimore was entitled to two Representatives, one from the town, and one from the country; by this law no term of residence was prescribed; it merely directed that the Representative from the town should be a resident. The law not declaring the length of time necessary to a residence, the House were at liberty to put the same construction on the law as had been assumed by the inhabitants of the town of Baltimore. It appeared that Mr. McCreery had resided sometimes in the country, and sometimes in the city; his intention was to reside there during the winter, but he was called away by public business; and though it did not appear that Mr. McCreery did reside in the city during the winter months, it appeared that he would have done so, but that his absence at Washington on public business prevented him; he was, therefore, to be considered as fully and completely a resident as if he had actually resided there during the winter. Mr. B. recollected that, on this subject, a decision had taken place in the State, which he had the honor to represent. A plea was offered against the due election of the Governor, on the ground of non-residence; his situation was similar to that of Mr. McCreery. His plea of residence was sustained, and it was decided that he was a resident of the city of Savannah.

In the construction of laws, Mr. B. said it was a sound principle that, whenever the reason of the law was satisfied, the law itself was satisfied. Who were the people interested in the decision of this question? The people of Baltimore themselves. What view had the Legislature of Maryland when they passed this law? They had presumed that there might be a collision of interests between the city and county, between the commercial and agricultural interests, and thought correctly that they should both be represented; therefore, had the law been passed, which directed that one should be chosen from the city, and one from the county. For several years, Mr. McCreery had been a Representative from the city of Baltimore. At the last election he had received a large majority, not from the county only, but from the city of Baltimore. Now, if the people who were interested in the election, had, by their suffrages, determined that Mr. McCreery was a resident of the city of Baltimore, and were willing that he should be their Representative, why was any question necessary even as to his residence?

Mr. B. concluded with saying that this decision of the people would be with him a sufficient inducement to vote in favor of the sitting member.

Mr. RHEA, of Tennessee, suggested to the gentleman from Georgia the propriety of withdrawing his amendment, in order to allow Mr. R. to make a motion for striking out of the report of the Committee of Elections the word *therefore*, preceding the resolution which terminated the report, and which would completely separate the resolution from the report. An amendment of this kind Mr. R. thought would remove all difficulty.

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Remarks of Mr.  
Rhea, of Tenn.

Mr. QUINCY would submit to the committee a few observations on the great question now under consideration. He had heard the observations of the honorable chairman of the Committee of Elections, (Mr. FINDLEY,) and the arguments of a member of the committee, (Mr. STURGES,) in favor of the report, and he confessed he was perfectly satisfied with the reasoning of the report, and with the justice of the decision which it recommended. But his mind, as well as that of every member in the House, was turned very forcibly to the subject by the solemn appeal made to them by the gentlemen from Virginia, who had placed the subject in so strong a point of view, that it had determined him (Mr. Q.) to look into the constitution, and consider it well before he gave his vote on the question. He had done so, and it had only more fully satisfied him of the justice of the report. He should not submit to the House the reasons which had actuated him in this decision, had they been anticipated by any gentleman who had yet spoken on the subject.

Speech of Mr.  
Quincy, in fa-  
vor of the sit-  
ting member.

In order to the investigation of this report, it would be necessary for him first to make one or two remarks in reply to observations made by the gentlemen from Virginia on his right and left, (Mr. LOVE and Mr. RANDOLPH.) The gentleman on his left, who first spoke on the question, had said that, in declaring a law of a State unconstitutional, they were proceeding on dangerous ground, and had objected to a decision on the law of Maryland from that consideration. Mr. Q. said, if they even thought with that gentleman, they were compelled to decide the question. But there was a way of amending the constitution of the United States; and if the people did not approve the decision which the House might make, the remedy was in their own hands. The question therefore of danger was not a consideration to deter the House from the exercise of its duty; they were to look into the constitutional right, and pursue the path of their duty, without suffering themselves to be influenced by any other consideration. There was another observation of the gentleman from Virginia, which he should not have noticed at all, if it had not been thrown out so conspicuously; it was to this effect: that a respect for the State laws was a criterion of the American character. This observation, Mr. Q. said, confined within its proper sphere, was undeniably correct: but so was respect for personal and national rights a criterion of American character. He did not mean to apply this

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Speech of Mr.  
Quincy, in fa-  
vor of the sit-  
ting member.

observation to the gentleman from Virginia, because his expression had not authorized it; but if it were meant by the gentleman, that the national rights should yield to the State rights, he could not reconcile the doctrine with his sense of duty. Powers were given to Congress by the people, to be exercised agreeably to the provisions laid down in the constitution. It was their duty to examine what those powers were, and when ascertained, to exercise them in all cases on subjects which came properly before them. He thought the General Government should yield no further to States than it would to individuals. He respected the State authorities within their natural and constitutional bounds, moving within the orbits which had been assigned them; if they transcended these orbits, they should meet with no respect from him. The constitution contemplated, and indeed made it a duty, that they should examine into these things.

There was an error in point of fact, which it appeared to Mr. Q. had crept into the arguments of gentlemen who supported the constitutionality of this law, viz. that the constitution was a confederation of the States. The gentleman from Virginia, who had so forcibly drawn his attention to the subject, had quoted the constitution in support of this argument; there was an important article in the constitution which the gentleman had no doubt not intentionally omitted, that "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It was a delegation of powers in the constitution not merely to the States, but to the people, who constituted those States. The language of the constitution was not "we the States," but "we the people" of those States. Their power was derived from the people; they were responsible for the exercise of that power to the people, and not to the States. The authority of Congress was as broad as that of the States within the limits prescribed by the constitution, and as dear to the people. The only question in all these cases was, whether the powers they exercised were agreeably to the constitution. The people were the basis of their power, and this House derived its authority from them, and not from the States. The people had not allowed them to receive their powers from the States; they meant that Congress should receive their powers from the people alone; and the people had said to them, "exercise these powers," without allowing them to make any barter or sacrifice of them, or to yield them to the States.

Much had been said, and a loud warning given to the House, not to adopt powers by mere construction. Mr. Q. was happy that in this case they were assuming no powers not expressly delegated to them: and this brought him to the arguments which he would offer on the provisions of the constitution.



Mr. Q. said that he laid it down as correct, that there was a great distinction between *powers granted* and *rights reserved* to the people. In the first clause of the fourth section of the first article of the constitution, it was provided that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the place of choosing Senators." Here was a power granted, and to whom? To the States. It was a qualified power which the people had granted; for in case Congress chose to exercise this power, the States should not exercise it; but till that time the States were at liberty to exercise it. What was the power? The power of prescribing times, places, and manner. Did the case at present under consideration come within either of these? No construction of the constitution would warrant the supposition that it was included in either. It must be remembered, that if the power of fixing qualifications be not given in this clause, it was given nowhere; there was no delegation of it to the people, or to the States. Another part of the constitution says, "each House shall be the judge of the elections, returns, and qualifications of its own members," &c. Here then it appeared that the power of judging of the qualifications of its own members was given to that House, and not to any State. The time, place, and manner they *might* direct; but the power of determining on constitutional qualifications belonged *exclusively* to that House. As to rights reserved, now came in the tenth amendment to the constitution, cited by the gentleman from Virginia on his right, which speaks of rights reserved to the States, or to the people. What rights? When the whole right of voting was the subject of consideration, as it was at the formation of the constitution, the exclusion of a part was the inclusion of the remainder. The constitution had said that certain persons should not have a right to be elected members of this House: was not this a declaration that all others might? This was a right then which was reserved to the people, and not to the States. Gentlemen might show the wisdom of giving it to the States, but not the necessity, except they could show some objection to the people's exercising that power.

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On the right  
of a State to  
add qualifica-  
tions not re-  
quired by the  
constitution.

He would not, upon this occasion, enter into any inquiry on the question of expediency, because, according to his view and clear conception of the constitution, he could not consider an attempt made by a Legislature of any State to annex qualifications, in any other light than as a direct violation of the rights reserved to the people. All question on expediency was therefore at an end, although the arguments which had been drawn from the consideration of expediency were very strong; for if the States could annex one qualification, they could annex another, and they would make

Denies the  
right of a State  
to add qualifi-  
cations, &c.



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Speech of Mr.  
Quincy.

one class of men alone eligible, and destroy the fundamental principles of our Government.

The gentleman from Virginia had, the other day, introduced a doctrine intended to excite the apprehensions of the members of the House. He had said that, by the laws of some States, persons of color would have a right to enjoy the privilege of a seat on that floor. Would it be said, from this reason, that the States had a right to affix qualifications? The case was so extremely absurd that Mr. Q. would not have noticed it, but from an effect which this power in the States might produce, and one much more likely to happen than that which the gentleman had supposed, considering the prejudices of the Southern States. Suppose that one of the Northern States should say that *none but* a black man or a man of color should be elected. He did not expect it ever would be the case, but merely placed the question in a strong point of view, to show that the power contended for by the gentleman might have fully as dangerous an operation as the denial of that power.

The other gentleman from Virginia (Mr. Love) had asked if they could not trust the States. Certainly they could. But if the authority now exercised by some of the States did not belong to them, they neglected their duty if they did not put a stop to it. The doctrine which the gentleman had urged, did not flow from the conclusions of the case which he had cited. The power of dividing the State into districts for the election of Representatives, was within the authority of the States; but when they said they should be residents in those districts, they exceeded their constitutional authority. Such a law, so far as it could operate on the people, was no more than a recommendation to them from the sovereignty of a State, that they should choose a Representative resident within their own particular district. But if the people chose to elect an individual in every other respect qualified, out of any other part of the State, in making that choice they would exercise no more than their right.

Summary of  
the positions  
maintained by  
him.

Mr. Q. would, in conclusion, merely recapitulate his arguments. 1. He contended that the right to be elected, was a right of the people, which they had reserved to themselves, except as limited by the constitution. 2. That they had not given to Congress the power to increase the number of qualifications, because it came within neither time, place, nor manner. 3. That if the House should determine that the States had a power to annex these additional qualifications, they would sanction in the States an exercise of authority which could not be justified by the constitution of the United States.

Speech of Mr.  
Key, of Mary-  
land.

Mr. Key. Mr. Chairman, if the committee will have the goodness to indulge me, I will assign the reasons which induce me to hope the present amendment may be rejected.

I am, in some measure, called upon by the observations of an honorable member who has taken part in this debate, and who has endeavored to alarm our fears for the safety of the State sovereignties, in case the law of Maryland should be declared unconstitutional. If the Legislature of Maryland has, in the instance before us, transcended its authority, however delicate the ground we tread on, our duty must be performed. We are to decide on the constitutional qualifications of a member returned duly elected, and on this subject our powers are judicial, not legislative. Under the constitution, we are expressly made judges of the qualifications of the members. We are sworn to support that constitution, and we must discharge that duty with integrity and uprightness.

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1st Session.

Speech of Mr.  
Key, of Md.  
against the pro-  
posed amend-  
ment.

One objection to the amendment is, that it covertly causes us to decide on the very point which it openly professes to avoid. Whoever votes in favor of the proposed amendment, does recognise the constitutionality of the State law; and hereafter it will be cited as a precedent in support of State authority; and, if such be the opinion of the committee, let it be openly and fairly avowed.

It has been said by an honorable gentleman from Virginia, that if there was an unerring criterion by which to judge of a person's political sentiments, it was his adherence to the State sovereignties; and so far I agree with him; but permit me to go one step further, and say that it is equally an unerring criterion to judge of a person's political correctness, to ascertain his attachment to the constitution of the United States; for it is in vain to profess an attachment to one, at the expense of the other; both as the basis of political security must be equally respected. The State and General Governments must respectively move in their proper orbits, constitutionally assigned them; and then, like a well constructed piece of mechanism, all will move harmoniously whilst each part performs what is assigned it. Should, however, the State Governments usurp authority over the qualifications of Representatives, we must not shrink from our duty, but judicially declare the usurpation, and pronounce the act void.

The question is not fairly presented to the House. It is not whether Mr. McCreery or Mr. Barney is entitled to a seat in this House. That is a minor consideration, wholly absorbed. The real question is this: "Shall a portion of the people of the United States, claiming their Representative under the constitution of the United States, be restricted in their choice by a State law? Can a State abridge the elective franchise, by superinducing other qualifications in the elected than those required by the constitution of the United States?" I have before stated, and I now repeat, that I will not vote on this subject, because I may be supposed to have an interest in the decision, as it involves

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Speech of Mr.  
Key, of Md.

He denies the  
right of the  
State to affix  
new qualifica-  
tions not re-  
quired by the  
constitution.

principles to be decided in my own case; but though I shall not vote, I hold myself free to assign my reasons, and thereby endeavor to protect in my constituents those privileges which the State has endeavored to take from them. To whoever will attentively consider, and compare the different passages in the instrument in my hands, (the constitution of the United States,) there can exist no doubt but that all legislation is closed as to the qualifications of the elected or Representative; being a constitutional provision, neither Congress nor the State Legislatures can interfere.

By the second section of the first article, it is declared, "The House of Representatives shall consist of members chosen every second year by the people of the United States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." This is all that respects voters. Let it be remembered that the convention who formed the constitution of the United States, had met to form a National Government, and that the right of suffrage presented itself clothed with great difficulties, no two States having precisely the same qualifications. In the State of Virginia, a freehold qualification was necessary to entitle a citizen to vote. In some States a certain amount of personal property was necessary; in others universal suffrage prevailed; in some was combined, with the elective franchise, a longer or shorter period of previous residence, of age; and one permitted a certain class of females to vote. From this view of the elective franchise, may at once be perceived the difficulties under which the convention acted, and the almost impossibility of a uniform qualification: for, had the convention adopted, as a uniform rule, the qualifications prescribed in any one State, it would have violated the habits and practice of almost every other State. To avoid this difficulty in a Government founded on compromise, and to go into operation on the subsequent adoption and approbation of the citizens, a most happy expedient was devised, which was, to give to the electors in each State for Representatives to Congress, the same qualifications that were requisite for the most numerous branch of the State Legislatures. This could not fail to be acceptable to each State, because it adopted the usage of each State. Our patriot convention conformed, as far as was practicable, to the wishes of the several States, and this spirit of compromise pervading the constitution of the United States, was the pledge of its adoption.

The second paragraph of the second section of the first article of the constitution of the United States is in these words: "No person shall be a Representative who shall not have attained to the age of twenty-five years, been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he

shall be chosen." Before we examine this article, let us see by whom, and for whom, it was framed.

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The convention who formed the constitution of the United States, represented not the States; but the people of the United States. They met to form not a State Government, but a National Government for the people of the United States. The sovereignty of each State was solemnly guaranteed by the constitution, and as each State, whether great or small, was equally sovereign and independent, each State is equally represented in the Senate of the United States; each State sends two members; and this is the federative feature in our constitution; but the House of Representatives was intended as the immediate representation of the people of the United States. The constitution begins: "We, the people of the United States;" and the constitution having defined the qualifications of the electors, it proceeds to define those of the Representative, or elected. It was surely competent to the convention, who represented the people of the United States, to say what qualifications their agent, Representative, or law maker, should possess, and they accordingly fix three. 1st. That he shall be above the age of twenty-five. 2d. Seven years a citizen of the United States. And, 3d. An inhabitant, when elected, of the State in which he shall be chosen. Uniformity could not, I have shown, be obtained as to the qualification of the electors; but it was most desirable in the elected, and, as it could easily be obtained, is accordingly specified in the constitution; and the expression of these qualifications in the constitution, is the exclusion of all others; so, to define the qualifications of the elected, was within the power of the convention, was their duty, and is set forth in the constitution itself.

Speech of Mr.  
Key, of Md.

But it is objected that the expressions used in the constitution are negative ones, and do not prevent the States from superadding other qualifications. To this I answer, first, that if the words are changed into positive instead of negative terms, it makes no difference in the meaning; for instance, each Representative shall be above the age of twenty-five, &c. creates no difference in the construction or meaning of the article. You may make a new article to remove the difficulty, but the present one cannot be altered in signification, whether the terms remain negative, or are changed to affirmative ones. I will hereafter consider the effect of these words, when used to describe the qualifications of President.

Secondly. As to the power of the States to superinduce other qualifications to the three enumerated in the constitution of the United States, I say, and I lay it down as a political truth, that the States, in their sovereign capacities, have no power, right, or authority to interfere with the elections of Representatives to Congress, except so far as the constitution of the United States gives them special powers so to do. By

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Argument on  
the powers of  
the States in  
regard to the  
subject of elec-  
tions, by Mr.  
Key.

On the rights  
of the States,  
&c.

what authority do the several States interfere in elections of Representatives to Congress? Let each man honestly put this question to himself. Is it under the principles of State sovereignty? No. By what authority then? I answer, by the express authority of the constitution of the United States, in these words: first paragraph of fourth section of article first: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." Every man acquainted with our political institutions must say that the State Legislatures derive their authority from the above article, to interfere with the United States elections. It was impracticable for the convention to introduce an election law into the constitution; they, therefore, left certain powers with the States. What are those powers? To regulate the time, place, and manner of holding elections. It is a special, limited power, for particular designated objects. The first branch of the power gives authority to the State Legislatures to regulate the time of holding the election; surely the time of holding the election has no relation to the previous residence or qualification of the candidate. Secondly. The State Legislatures may regulate the place of holding elections; manifestly this power has no reference to the qualification of the candidate. And thirdly. The State Legislatures may regulate the manner of holding elections. Now the manner of holding an election has no connexion with the previous residence or qualification of a candidate; but it implies that the election may be *viva voce*, by ballot, by districts for the convenience of the voters, or by the States in a general ticket. When the constitution designates three qualifications, and no more; and when that same constitution gives to the States the limited power to prescribe the time, place, and manner of holding elections, can any reasonable man believe that the States have power to add qualifications of age, property, or residence? If the States have power to add one qualification, they have power to create all. If they can make one year's previous residence in a district necessary, they have equal power to make forty necessary; and if they can limit the residence (as in this case of McCreery) to a particular part of the district, they may to a particular house in the district, and so localize a man as to take all power of election from the people; totally destroy the elective franchise. They may say, with equal power, that no man under £1,000 a year shall be a Representative. Mr. Chairman, the people of every State in the Union have a direct interest in every member of the House of Representatives; these members do not represent, in this House, the people of any particular State, but the people of the United States generally, and are competent to raise taxes from the whole people of the



United States, though all the Representatives of any one State should oppose the law, and to bind all the people in every State by their votes and acts; hence the people in each State are interested in the qualifications of the Representatives of every State, and no one State can destroy this right. It was from this great principle that every Representative, from whatever State he comes, may, by his acts and votes, bind the citizens of other States, declare war, or lay taxes, that the constitution defined the qualifications of the elected; limited the power of the States simply to the time, place, and manner of holding the elections; and declared, in terms too plain to be perverted, "We the people" of the United States have declared who may elect, and who be elected, and we leave to the States (until Congress shall otherwise direct) the power to prescribe the time, place, and manner of letting such qualified electors choose such qualified Representatives.

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Speech of Mr.  
Key, of Md.

It has been said, but faintly relied on, that if the States have power to fix election districts for the electors, they may equally locate the Representative. But this is a great mistake. The constitution, in permitting the States to determine the manner of holding elections, permits them, if it suits their convenience, to hold them in districts; but the attempt to curtail and rob the people of their elective franchise, by making the eligibility of the candidate depend on the locality of his residence, is out of their power, and not given to them by the constitution. As to the propriety and policy of such power being placed in a State, it is not now a question. We are not framing a constitution. We are examining where it is placed by our constitution. If it is not well placed, there is a constitutional mode of altering it.

But gentlemen say that the States, for twenty years past, have added qualifications of residence to Representatives. To this I answer, that if the Representative is a resident of the district, he must, *ex necessitate*, be of the State, and of course have the constitutional qualification. But I perceive great danger in this doctrine. Violations of the constitution, by some of the States, are now cited as precedents from which destructive conclusions are drawn, although the cases cited have never been acted on. Thus the assumption of power by the Legislatures of some States, is made to justify itself. If these innovations, thus practised, and never brought judicially into the view of this House, are permitted to go on, they will, in time, like water dropping on a stone, wear away the very substance of the constitution.

Of the power  
of the States,  
&c. in regard  
to elections and  
the qualifica-  
tions of the  
elected.

Now is the time to act on the subject. It is fairly before us on the report of the committee; and in what capacity do we act? In our judicial capacity, as judges under these words in the first article of the fifth section: "Each House shall be the judge of the elections, returns, and qualifications of its own members." We have no discretion as a



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Key, of Ml.

legislative body. We cannot look into the policy or propriety of the qualifications. We are sworn to support the constitution. We sit as judges under it, and it is our bounden duty to declare if the State of Maryland has violated the United States constitution, by imposing on a Representative other qualifications than that instrument requires.

It is a sound rule, in construing instruments, to examine the different parts of them, and if the same words are used on a similar subject, they must have the same interpretation. I pass by the senatorial qualifications, where the same negative expressions are used. I will proceed to the qualifications of the President of the United States, article 2, section 1, paragraph 5: "No person, except a natural born citizen, or a citizen of the United States at the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States." The expressions used in this article are in negative terms, in the same manner as those used with respect to qualifications of the Representatives; and does any reasonable man, and does any friend of the constitution, say that the States can superinduce or add any other qualification to the President than those designated by the constitution? If negative expressions apply to one case, so they do to the other. If the doctrine of reserved powers applies to one case, so it does to the other. What would be the absurd consequence of investing the State sovereignties with power to add other qualifications to the President? The nine small States might add qualifications of age, residence, or property, and the eight large States, from their numbers, might elect a President without any of the qualifications limited by the majority of the States. What a singular phenomenon this would produce! A President elected by a large majority of the electors without the qualifications prescribed by a majority of the States! An argument producing such absurdities need not be pressed further. It is impossible to let the States interfere with the qualifications of the Representatives, and yet restrain them from interfering with the qualifications of the President. Very nearly the same expressions are used in each case in the same instrument, defining the qualifications.

A distinction is attempted which cannot be maintained, viz. "that the President is elected for the United States, and that no State can alter the qualifications in which all have an interest." I admit it; and this argument is most strongly in my favor, for all the citizens of the United States have an interest in each Representative, and therefore no State can alter the qualifications of a Representative; each Representative may, by his single voice, declare

war or lay taxes. He who can command the sword and the purse of the people must represent them ; and consequently each member must represent the people of the United States, not the people of his State ; for to say that a person can, by his voice, lay taxes on persons whom he does not represent, or make them go to war, is a principle hostile to republicanism, and tears up the foundation of our Government.

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Speech of Mr.  
Key, of Md.

It is said the States ought to have power to add qualifications of residence, or the people may choose transient persons ; but this argument proves too much, because, when pushed far, it proves the people not competent to self-government.

I derive some consolation from the circumstance that I am a young member of little or no political influence ; hence my arguments have nothing to recommend them but their intrinsic weight, and in a constitutional question this is most desirable. We should be on our guard against the high character and influence of the gentleman from Virginia, whose opinions, from his talents and standing in society, may be received as correct, without accurately investigating them. But is my doctrine new, Mr. Chairman ? No, sir, it is a doctrine coeval with the constitution, and supported by our ablest men. In a work of high celebrity, the *Federalist*, composed by Jay, Hamilton, and Madison, men eminently distinguished for their patriotism and their talents, and who, with dignified reputation, have filled the highest offices in our country, this doctrine is explicitly stated and ably maintained. The same doctrine is supported in the debates in the Virginia convention, where some illustrious characters exhibited their acknowledged talents. There, sir, an objection was taken, that there was no freehold qualification in the Representative, the darling object of Virginia. Those who made this objection never supposed the qualifications were not fixed by the constitution ; for men of such talents and reputation would never have urged that as an objection to the constitution, if for a moment they had supposed the Legislatures of the States competent to make such alteration.

I have yet, sir, another high authority. A learned commentator on Blackstone, every way distinguished for his worth and his learning, has, on this very subject, suggested doubts "if State qualifications, that is, a freehold required by the Virginia laws, were not rendered void by the constitution of the United States." [See Judge Tucker's Commentaries.] The Judge's doubts are suggested only, but this was all he could do, for delicacy and propriety would not permit him to give an absolute opinion on a subject which might come judicially before him. Fortified with these opinions, and justified by the constitution itself, I fear no hazard in the assertion "that the States are not competent to divest the people of their elective franchise, secured

Doubt suggested by Judge Tucker, as to property qualifications in Virginia.

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Howard.

other than those required by the constitution of the United States. Those gentlemen who advocate her right so to do, seem to think, when we undertake to determine the constitutionality of the law, it amounts to an infringement of her rights as a sovereign State; in fine, that this becomes a question of power between the General Government and the State sovereignties. Mr. H. said for his part he thought differently: that, as a member of this House, he not only disclaimed all power to legislate upon the subject of the qualifications of the elected, but denied the right of Congress either to dispense with those required by the constitution, or to superinduce others. He conceived that the qualifications of members was a fundamental regulation fixed by the constitution, and unalterable but by a change or amendment of the instrument itself.

While some gentlemen on the other side of the question expressed their abhorrence at the exercise of a power derived from implication, others contended that from the negative words employed in the second section of the first article of the constitution of the United States, a power was implied to exist somewhere to add other qualifications to the elected, besides those therein required, and that it was left with the States, by virtue of that provision of the constitution which declared that all powers not delegated to the General Government, nor prohibited to the States, were reserved to the States respectively, or to the people. But, said Mr. H., while gentlemen contend for this rule of construction, they ought to be aware of its operation when applied to other sections of the constitution couched in similar terms. Apply it to that section which prescribes the qualifications of your Senators, and, if gentlemen be correct, the States have the power to enlarge the qualifications of a Senator, to say, for instance, that he shall have attained to the age of thirty-five years, instead of thirty; or that he shall have been fifteen years a citizen of the United States, instead of nine, as required by the constitution; or, what would be still more absurd, that a State has the power to add a new qualification, that no person should be eligible to the Senate, unless he resided in a particular part of the State designated by the law itself. Apply the same rule to the fifteenth section of the second article, which prescribes the qualifications of President, and it proves that the States have the power to declare by law that no person shall be eligible to the office of President unless he is a resident of a particular State or section of the Union. Mr. H. said, if gentlemen would only go through the constitution and apply this rule of construction to every part of it, the phraseology of which was the same with that of the section under their immediate consideration, they would discover its fallacy, and the endless difficulties and absurdities into which it would lead them. Mr. H. said gentlemen seemed to think the right of the States to legislate on the subject of

qualifications, was well secured and fortified by the provision of the constitution, "that all powers not delegated to the General Government, nor prohibited to the States, are reserved to the States respectively, or to the people." He considered it a self-evident proposition, that no power could be imparted by the States to the General Government, or reserved from it, which was not previously possessed by them. It, therefore, was incumbent upon gentlemen in opposition to prove that the States, anterior to the adoption of the federal constitution, were vested with that power, which could not be done. The States, in the formation of our federal compact, certainly delegated a portion of their powers, previously possessed, to the General Government, and this reservation of power, so far as it related to the States, had reference to the residuum of those powers which they wished to retain and exercise exclusively.

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Mr. H. said an honorable member from Virginia (Mr. RANDOLPH) had enumerated many evils which might result from the want of power in the States to legislate upon this subject, among others that a man of color might find his way into this House as a member, for any thing which appeared in the federal constitution. Mr. H. observed that had he no other security against an event so unpleasant, but that confidence which he had in the discretion of his countrymen in the exercise of their right of suffrage; he would not be disposed to indulge apprehensions; but were that confidence wanting, he discovered an ample guard provided by the constitution itself, in that section now under consideration, which declared that no person should be a Representative unless he shall have been a citizen of the United States seven years, &c. Mr. H. observed that the word citizen was a complex term, and in its constitutional acceptation meant something more than a mere inhabitant; it meant a man possessed of certain civil and political rights; every citizen must be an inhabitant, but it did not follow that every inhabitant was a citizen. Mr. H. asked the gentleman if the man of color possessed those characteristics of a citizen, or whether he was not rather one of those unfortunate people who had no political rights; governed by laws of which he was not only ignorant, but in the formation of which he had no participation. If the gentleman was prepared to say that this kind of person came up to the constitutional meaning of a citizen, he would admit that the event, equally deprecated by that gentleman and himself, might possibly happen.

Debate in Committee of the Whole House, the amended report of the Committee of Elections, on the 23d December, 1807, the concluding resolution being under consideration,

Mr. LOVE moved to strike out of the resolution the words "agreeably to the constitution of the United States."

Mr. GOLDSBOROUGH suggested the propriety of Mr. LOVE's withdrawing his motion, and renewing it in the House,

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Debate in Com-  
mittee of the  
Whole House.

where the votes on the question could be recorded, but Mr. L. declined withdrawing it.

Mr. KEY objected to the motion, because the House would, by agreeing to such an amendment, express an opinion that a member could be entitled to his seat without being duly qualified, which was absurd.

Mr. LOVE defended his motion, and declared his wish to be, to avoid a decision on the rights of States.

Mr. SMILIE said there was no member in the House but believed Mr. McCreery was qualified by the law of the United States, and he could not conceive the object of the motion.

Mr. MACON said he would prefer voting on the resolution in the original form in which the committee had placed it in their first report.

Mr. NELSON declared his firm belief that William McCreery was not entitled to his seat; that the resolution, as reported, was insidious, though he believed it was not intended or perceived by the committee, as it went to prostrate the law of Maryland. He believed the State had a right to fix qualifications for its Representatives, and would contend for that right as long as he lived. If the law of Maryland was constitutional, Mr. McCreery was not entitled to his seat. If it was unconstitutional, he was duly elected. Gentlemen might evade the question in any way, but it should be taken in such a manner as fairly and honestly to show the grounds on which they voted. He always wished to register his vote in such a way as to show to his constituents clearly the reasons which actuated him.

Motion to  
amend.

Mr. MARION moved to amend the amendment proposed to the resolution, by striking out other words, so that the resolution should read thus:

*“Resolved, That William McCreery is entitled to his seat in this House;”* and thereby avoid a division on the constitutionality of a State law.

Mr. RHEA advocated the amendment last proposed, from a wish to avoid a decision on State laws.

Mr. CLOPTON advocated the amendment, and discussed the general principles of the constitutional question in a highly argumentative speech of considerable length. He very strongly supported the right of the States to annex qualifications, and pointed out the evils to be feared from a contrary decision, which would be implied by the resolution as reported. He was followed by Mr. SLOAN on the same side.

Messrs. FINDLEY and STURGES opposed, and Messrs. GOLDSBOROUGH, G. W. CAMPBELL, and UPHAM, supported the amendment last offered.

The question being taken on the amendment, was carried; Yeas 73.

The question was then taken on the resolution as amended, and carried; Yeas 83.

The committee then rose, and reported the resolution as amended.

On the question of concurrence in the House with the Committee of the Whole, Messrs. KELLY and SMILIE opposed, and Messrs. MARION and TAYLOR supported it.

The question was then taken on the amendment, by yeas and nays; Yeas 70; Nays 37.

Mr. RANDOLPH moved to amend the resolution so as to read

*“Resolved, That William McCreery, not being qualified according to the law of Maryland, is not entitled to his seat in this House.”*

The Speaker declared the amendment to be a substitute to the resolution, and, therefore, not in order.

Mr. RANDOLPH said he wished to bring the question of the constitutionality of the law of Maryland before the House, and, therefore, was constrained to move an amendment against which he should vote himself. He then moved to insert *“being duly qualified by the law of Maryland, is entitled,”* &c.

The Speaker conceived that the House had already determined that the word *“qualified”* should not be contained in the resolution.

Mr. RANDOLPH then moved it in another form: *“having the qualifications prescribed by the law of Maryland, is entitled,”* &c.

The motion being admitted in this form, Messrs. KEY and RHMA opposed the amendment.

Mr. MONTGOMERY said he should never give his consent to any proposition by which the House should be compelled to give a decision on the constitutionality of a State law; should never consent that the House should be erected into a tribunal for the purpose.

Mr. M. CLAY observed that, being a member of the committee who made the report, and that committee having been attacked both within and without the walls of the House, he was called upon by the committee, who had a meeting on the subject, to rise and state the truth as respected the proceedings of that committee. About the 9th of November, the committee had made a report on this subject, *“that William McCreery is entitled to his seat in this House.”* Not satisfied with this report, the House had sent it back for a more particular statement, on the suggestion of a gentleman from North Carolina, that the committee had not done justice to the petitioner; that they had not made a fair statement of facts as presented to them. On this subject a great discussion had taken place; it had received more consideration, and more deliberation, than any subject of the kind that ever came before the House. About the time that this report was recommitted, it was attacked, not only

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Debate in the  
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resolution re-  
ported by the  
Committee of  
the Whole.

Speech of Mr.  
Cly.

in the House, but also in a newspaper printed at Baltimore, under the title of "The Whig." After having stated the report of the committee, that paper concluded by saying that a particular fact was not admitted by Mr. Barney. Now, with respect to that report of the committee, the truth was, that the facts were taken down by the chairman of the committee, the parties being present. When it was stated to them, they could not directly agree; but, after some time, several days, the report was made out, and read to them. They seemed to agree, except in one point. Mr. McCreery contended that he had been in town ten days previous to the election, and Mr. Barney would admit but five or six days. They at last, however, agreed that it should be stated at five or six. The report was, at this time, read over to them several different times, and the parties did consent to the statement of facts. Five or six members of the committee were then present, who would bear testimony to this statement. At the time the member from North Carolina attacked the report, a member from South Carolina (Mr. D. R. WILLIAMS) rose, and stated the facts as Mr. C. had now stated them. The House, however, not contented with this statement, and wishing a more perfect report, sent it back to the same committee, who gave the parties time to procure further proof on the case. When they returned from Baltimore, they brought with them such evidence as they could collect, which was reported by the committee, and is now before the House. He should not now have risen, had not the report been attacked by that newspaper, and had not an honorable gentleman, whom he respected and esteemed as much as he did any member in the House, (Mr. NELSON,) declared yesterday that the last report was insidious. This was a heavy charge on the committee. Had that gentleman, or any other, stated wherein that report did not comport with the evidence? He had not, he could not. Members did not voluntarily form committees. They were compelled to do it by an order of the House. It was the duty of the Committee of Elections to collate evidence, and to state to the House such facts as might come before them, with their opinion thereupon. This was already done; and it must hurt the feelings of that committee to be "insidiously" attacked without, and openly within. That paper, which derived some eminence from assuming the title of "The Whig," had also attacked the last report as "insidious." Mr. C. thought it very unfair that the House or committee should be attacked while deliberating on a particular subject. After the subject was decided, it was fair game. That paper, or any other, had a right to discuss public characters, or public measures. It was also very unfair, Mr. C. said, that gentlemen could not step out of doors without being jostled on the way, and having opinions obtruded on them by persons certainly not more entitled to

respect than members of the House. The editor of that paper was possibly not to blame. He might be an honest man. Possibly these indecorous paragraphs may have been written by some member of the association, which, it seemed, supported the paper. Mr. C. did not charge any gentleman within, or without, but possibly there might be some sly, skulking member of this society lurking about these walls, and sending these defamatory paragraphs to the editor. By his observations, Mr. C. did not mean to attack the liberty of the press. He thought that and a liberal education the two main pillars of the great republican fabric. When speaking of the liberty of the press, he meant the fair reporter of facts, which spread from one end of the continent to the other, to inform the people of the measures adopted by their Representatives, and the reasons and motives on which they were grounded.

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House.

Mr. C. said he had taken a view of the proceedings, and what was the result? That the report of the Committee of the Whole of yesterday produced the resolution in the same form precisely as that reported by the Committee of Elections. The evidence last before the committee established the same facts that were originally admitted by the parties themselves. After the gentlemen had the subject more than a month before them, twisted and turned it, altered and amended it, sent it out of the House, and brought it back, they had now reduced the decision to precisely the same words as at first.

Mr. C. concluded by explaining his reasons for the vote he should give. He respected the State sovereignties as much as any man; thought them the great sheet-anchor of republican Government; but if they clashed with the Federal Government, he should err on the safe side of his oath, and support the constitution of the United States.

Mr. NELSON justified the observations he made, but totally disclaimed any intention of reflecting on the members of the committee, either in their aggregate or individual capacity. If any difference had occurred between the committee and "The Whig," let them settle it. He had nothing to say. But if Mr. N. was disposed to rise in his place, and repel every improper attack made on him in the newspapers, he should have enough to do.

Mr. BLOUNT said it was true he had made a motion to recommit a former report of the Committee of Elections; but, in doing that, he had not the slightest idea of impeaching the motives of that committee. He had then stated that he had heard Commodore Barney that morning complaining to other members of the House that the committee had stated certain facts which he had not admitted. But when the gentleman from South Carolina explained, he had been content, and had not said another word.

Mr. GOLDSBOROUGH said this amendment was a legislative manœuvre to embarrass the decision; at the same time

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Debate, con-  
tinued.

Motion to  
amend.

To recommit.

he did not impeach the motives of the gentleman who made it.

Mr. RANDOLPH defended the introduction of the amendment. He thought the only principle on which the decision of the case could turn, should not be taken out to satisfy the scruples of gentlemen who found themselves in a dilemma. He did believe that William McCreery was not qualified by the laws of Maryland, and, therefore, not entitled to his seat; and so he should vote.

Mr. ROWAN moved to amend the amendment, by striking out the words "the laws of Maryland," and inserting "law." He thought the constitution the supreme law of the land.

This amendment was declared to be a substitute, and therefore not in order.

Mr. ROWAN then moved for a division of the question, taking it first on the first clause of the amendment.

The Speaker declared that it could not be divided without changing its object.

Mr. ELY declared that he should not consider himself as being committed on the principle of voting against the amendment; but should vote against it, because he was perfectly satisfied with the present form of the resolution.

Mr. ROWAN moved to recommit the report or resolution to a Committee of the Whole House, to ascertain the principle on which the decision should be founded.

Mr. LOVE opposed the motion for recommitment, as it would be a great waste of time.

Mr. KEY was opposed to the amendment, and its introduction at this time, because a returned member was entitled to the sense of the House in the broadest manner, and without circumlocution. He also opposed the motion for recommitment.

The motion for recommitment was negatived, and the question on the amendment recurring.

Mr. BLACKLEDGE said the constitution of the United States being adopted by the State of Maryland, had as much become a law of the State as any State law. If the amendment were so amended as to confine it to any particular State law, he should certainly vote against it; otherwise, he should vote in favor of it.

Mr. GARDNER found himself considerably perplexed. In voting for this amendment, they would vote Mr. McC. elected on a different principle from that on which he should vote in his favor. In voting against it, they might vote him out of his seat.

The question was then taken on the amendment to add the words "having the qualifications required by the law of Maryland," and decided in the negative; Yeas 8; Nays 92.

Mr. BARKER advocated the right of States to superadd qualifications, of which he had not, till this discussion took place, conceived that there could be a doubt.

The final question was then taken, as heretofore stated, on the resolution, in the following words:

“Resolved, That William McCreery is entitled to his seat in this House,” and it passed in the affirmative; Yeas 89; Nays 18.

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1st Session.  
Sitting member  
entitled to his  
seat.

## CASE XXVII.

DUNCAN McFARLAND vs. JOHN CULPEPPER, of N. Carolina.

[The neglect of the returning officers to be sworn, where the law requires them to act under oath, will vitiate all returns made by them.

In this case the returns in three out of five counties of the district being defective, the committee also, not being altogether satisfied with the formality of election in the other two, declared in favor of a new election, and in this opinion the House concurred.]

NOVEMBER 3, 1807.

The right of John Culpepper to a seat in the House was contested by Duncan McFarland, who claimed to be himself duly elected. On the 17th December, 1807, the facts in the case were laid before the House, by the Committee of Elections, in the following report:

“That the claim of the petitioner is not grounded on constitutional qualifications, but on the law of North Carolina, prescribing the time, place, and manner of holding elections for Representatives to Congress. By a law of that State, passed 1802, it is enacted that elections for Representatives to Congress shall be held on the same days and at the same places as were before that time prescribed by law for holding elections for members to represent the several counties in the General Assembly of that State: that the same is to be conducted by the sheriffs of the several counties within the State, and the deputies of said sheriffs, in like manner as the annual elections of members of the General Assembly are, except that the inspectors of the elections and clerks of the polls shall be sworn to act with justice and impartiality; which oath shall be administered by any justice of the peace then present. That no person shall vote at any election except in the county where he resides: that no person shall vote more than once in any election for members of the General Assembly, or for a Representative in Congress: that elections for members of Congress shall be conducted by the returning officer in the same manner as the elections for members of the General Assembly heretofore had been.

Report of the  
Committee of  
Elections.

“In the act passed 1784 for directing the method of electing members of the General Assembly, &c. it is enacted that the returning officer shall keep the election open two days and no longer; and the returning officer shall, at sunset of the first day, in presence of the inspectors, put his seal

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1st Session.

Report of the  
Committee of  
Elections.

on the place to be made for the reception of the tickets, which, when he shall continue the election, shall be removed the succeeding day.

“By another act, passed 17th December, 1805, it is directed that the elections which shall be held in the counties of Onslow and Richmond shall be on the second Thursday in August in every captain's company, at the places fixed on by them for holding the petit musters. And it is enacted, section seven, that the elections for members of Congress and for electors to vote for the President and Vice President of the United States shall be held in said counties at the aforementioned places, and in the same manner, subject to the same rules and restrictions as other elections within this State.

“Duncan McFarland states, in his petition, that the certificate of John Culpepper's election was fraudulently and illegally obtained in direct violation of the laws and constitution of the State of North Carolina, which he proposes to prove by statements and depositions accompanying his petition.

“The committee having examined Duncan McFarland's statements and depositions, find numerous irregularities and abuses alleged; and supported by numerous depositions; but as no law of Congress now exists directing the manner of taking testimony in cases of contested elections, or for compelling witnesses and parties to attend when called upon, many of the depositions transmitted by the petitioner in support of his statements, being taken *ex parte*, could not be admitted by the committee.

[Such as they did admit go to prove the following facts, to wit: \* that, in some of the election districts, the inspectors and clerks were not sworn at all; that in others they were sworn after the election, though before the return; while in others it appeared doubtful, from the testimony, whether they were sworn or not.]

“No full official lists of the polls, or number of votes given to the parties contesting, were laid before the committee; but both parties agree that the sitting member had 2,750, and that Duncan McFarland had 2,701; that consequently John Culpepper had a majority of 49 votes.

“From the above recited testimony, admitted by the committee, it appears that the inspectors and clerks officially employed in conducting the elections in Richmond, Anson, and Montgomery counties, do not appear to have been sworn as the law of North Carolina expressly directs, and that the votes given in some of these counties, and at some elections in other counties, not being received by officers legally qualified, ought to be rejected.† On rejecting the returns

\* The evidence, in *extenso*, is here omitted, and the general result abridged from the report.

† In the case of McFarland vs. Purviance, (first session of the eighth Congress,) it was decided that the neglect or refusal of inspection officers to take the oaths required by law to be taken, vitiated their returns. See also Scott vs. Easton.

of Richmond, Anson, and Montgomery counties, in which it appears, by the list of voters and testimony admitted, that John Culpepper had a majority of 1,578 votes, gives to Duncan McFarland a large majority of votes in these counties. Some depositions were laid before the committee respecting the elections in Moore county, taken at the instance of a friend of John Culpepper, in his absence; but though they go to prove that the elections in Moore county were not conducted agreeably to law, yet, being taken *ex parte*, they were [not] admitted.

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1st Session.

Report of Com-  
mittee of Elec-  
tions.

“From the testimony admitted, it appears that John Culpepper is not entitled to a seat in the House, he not having a majority of votes legally taken; but though Duncan McFarland appears to have a large majority of votes taken agreeably to law, yet the committee are of opinion that the truth of this is doubtful; they are the more confirmed in this opinion, from the sitting member having expressed his opinion that if he had time allowed him to make a scrutiny, he would prove the elections held in the other counties were also conducted contrary to law.

Sitting member  
not entitled to  
his seat.

“The committee, however, believing that the great object for which the power of judging of the election of members was vested in Congress, was to secure to the people a representation of the majority of the citizens, the elections of Richmond, Anson, and Montgomery being rejected, give a majority of the votes taken in Moore and Cumberland counties to Duncan McFarland, viz. a majority of two counties out of five, which compose the congressional district, and the votes of three counties are lost.

“The committee are of opinion that, even presuming the votes in Moore and Cumberland to have been legally taken, it would be improper to deprive the other three counties of a representation for the fault of their election officers, &c., therefore think it most proper to give the citizens of that district an opportunity to have another election, and for this purpose submit the following resolution:

The election  
declared ille-  
gal, and the sit-  
ting member  
not entitled to  
his seat.

“*Resolved*, That, from the testimony laid before and admitted by the committee, it appears that John Culpepper is not entitled to a seat in this House.”

The House having concurred in the opinion of the committee, the seat of John Culpepper was declared vacant, and the Speaker was directed to notify the Governor of North Carolina of the fact.

[**NOTE.**—Before the close of the same session, J. Culpepper was returned as duly elected at a subsequent election, and took his seat in the House accordingly.]

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In England, “it seems that though the poll clerks are not sworn, the election is not void.” See first Peckwell’s cases of Controverted Elections in Parliament, p. 506. The law there requires them to be sworn.



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1st Session.

## CASE XXVIII.

## SUNDRY ELECTORS vs. PHILIP B. KEY, of Maryland.

[The sitting member became an inhabitant of the State on the 18th September, 1806, declaring, both then and previously, his intention to make that his permanent residence. On the 6th of October following he was elected to Congress. It was decided, on the contest of his election, that he was, within the meaning of the constitution, an inhabitant of the State, and entitled to hold his seat.]

On the 4th of November, 1807, the petition of sundry electors of the third congressional district of the State of Maryland was presented to the House, praying that the seat of Philip Barton Key, their accredited Representative, might be declared vacant, on the constitutional ground that he was not, at the time of his election, an inhabitant of the State.

On the 11th December Mr. FINDLEY made the following report :

Report of the  
Committee of  
Elections.

“The following statement, agreed upon by the counsel of the petitioners, who pray that the seat of P. B. Key may be vacated, and by Mr. Key himself, was amicably submitted to the Committee of Elections, and the committee submit the same to the House as part of their report.

“The committee observe that, by an act of the State of Maryland, passed the 25th of January, 1806, residence is not prescribed as a qualification of candidates for Congress, except for the *fifth* district : and that by the said act to reduce into one the several acts of Assembly respecting elections, and to regulate said elections, it is enacted that all laws, clauses, and sections of laws, repugnant to, or inconsistent with, the provisions of this act, be, and the same are hereby, repealed. From which it appears that the law of Maryland, relied on by the petitioners against the seat of Mr. Key, is not now in force.

“From the above statement of facts, the committee are induced to submit the following resolution, and lay the memorial on the table.

Resolution.

“*Resolved*, That Philip B. Key, having the greatest number of votes, and being qualified agreeably to the constitution of the United States, is entitled to his seat in this House.”

The following facts were relied on by the petitioners, and agreed to by Mr. Key :

Statement of  
facts.

“1st. That, in the year 1801, Mr. Key became an inhabitant of the District of Columbia, at a country seat belonging to him about two miles from Georgetown, in an airy, healthy situation, commanding an extensive prospect.

“2d. That the country seat above mentioned is expensively built upon and improved, and in every respect furnished with accommodations for the permanent residence of a gentleman in a style of great convenience. 1807.  
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Statement of  
facts.

“3d. That some time in the month of November, 1805, Mr. Key purchased about 1,000 acres of land in Montgomery county, about fourteen miles from Georgetown, and about twelve from his seat in the District of Columbia. At the time of purchasing that land there was no dwelling-house nor enclosure upon it, except a few tenements occupied by tenants, the greater part of the land being waste old fields.

“4th. That some time in the summer of 1806 Mr. Key did cause a dwelling-house to be erected on his Montgomery lands, into which he removed with his family on the 18th of September, 1806, from his seat in the District of Columbia, where till then he had all along resided from the time of his first settling in said district, in the year 1801.

“5th. That, on the 20th of October, 1806, Mr. Key returned with his family to his seat in the District of Columbia, where he remained till about the 28th of July, 1807, when they again removed to his estate in Montgomery, where they remained until the 23d of October last, when they again returned to his seat in the District of Columbia, where they still remain.

“6th. That the dwelling-house on the Montgomery estate is not completed to afford a comfortable habitation to Mr. Key and family in winter, but is esteemed as fit only for a summer residence; and that it is, in respect to buildings, improvements, and accommodations, much inferior to his seat in the District of Columbia.

“7th. That, on both occasions above mentioned, when Mr. Key removed with his family from his seat in the District of Columbia to his estate in Montgomery, he left the former ready furnished, in its usual style, carrying but few articles, such as beds, linen, plate, &c. from one place to another, having supplied his House in Montgomery with other furniture purchased for that purpose.

“8th. That the election, at which Mr. Key was chosen, and returned, was held on the 6th day of October, 1806.

Admitted: PHILIP B. KEY.”

The facts thus found by the committee, and admitted by Mr. Key, were still further explained by the latter, in a written statement furnished by him, and made a part of the record.

*Facts on the part of Mr. Key, to show that he was a bona fide resident of Maryland, and of the district for which he was chosen, which facts are admitted by the counsel for the petitioners, and are as follows:*

1st. That Mr. Key is a native of Maryland; that he was a citizen and resident of that State at the adoption of the Statement by  
sitting member.

1807.  
10th CONGRESS,  
1st Session.

Statement by  
sitting member.

present constitution of the United States, and never was a citizen or resident of any other of the United States; that, since that time, he has served several years as a Delegate to the General Assembly of Maryland; that, in 1787, he qualified as counsel in the superior courts of Maryland, and ever since hath, and still doth continue to practise law in said courts; that, in 1801, he removed from Maryland to his house near Georgetown, (about two miles from said town, and about two miles from Montgomery county,) where he has continued to reside till 1806.

2d. That Montgomery county and part of Frederick compose the third congressional district, for which Mr. Key is elected; that the ancestors of Mr. and Mrs. Key held considerable real estates in said district, and some of the nearest relations of Mr. and Mrs. Key reside in, and hold large landed estates in said district, in each of the counties composing the same; that Mr. Key has, for several years last past, practised, and still does practise, law in the only court held in said district, and, from that circumstance, his serving in the Legislature, his living at Annapolis, the seat of Government, and an extensive practice for twenty years in the Supreme Court of Maryland, he has been for many years personally known to and by a great proportion of the voters of his district.

3d. That, in November, 1805, Mr. Key bought, and soon after had conveyed to him, one thousand acres of land in Montgomery county, part of his district, which land was part of an estate that had, for many years, been leased out by Mrs. Key's ancestors, and was much wasted, and out of repair.

4th. That, some time before this purchase, Mr. Key had declined the practice of the law in the Territory of Columbia, but still continued his practice in Montgomery; that, in January, 1806, he declared his intention to be a resident; that, in March, 1806, at Montgomery county court, he declared his intention to be a resident; that, in March, 1806, at Montgomery county court, Mr. Key often and publicly declared, and also to the people, when he often addressed them, that he had bought said land, with intention to become a resident of the county; that he intended to build a dwelling-house on said land; that he would move his family there as soon as it was built, and that he would make it his summer residence; and at the same time, that is, at March court, 1806, in Montgomery, he refused to stand as a candidate for Congress when solicited by his warm and influential friends.

5th. That, Mr. Key has made considerable and expensive improvements on said land; that he has, in 1806, built thereon, for his summer residence, a dwelling-house, by no means such a one as could be intended for a tenant, or overseer, but every way comfortable for a summer residence; that said house has all necessary offices and accom-

modations for household servants, and is kept ready furnished with necessary plain household furniture, tea and table service, and kitchen utensils, &c.

1807.  
10th Congress,  
1st Session.

6th. That before said house was completely furnished, to wit, on the 18th of September, 1806, Mr. Key removed, with his wife, children, and domestics, to said house, and did actually live in and inhabit the said house from said 18th of September, 1806, to the 20th of October, 1806, including the 6th day of October, on which the election was held; that, on the 20th of October, Mr. Key, with his family, removed back to his house in the Territory of Columbia. In July last, Mr. Key removed himself, family, and domestics, to his house in Montgomery, which he lived in, and inhabited until, on the 28d of October last, he returned to his house in the Territory of Columbia, to attend his duties in Congress.

Statement by  
sitting member.

7th. That no political rights are acquired or attached to a residence in the county of Washington, in the Territory of Columbia. A person so situated has no right of suffrage, can neither elect, nor be elected.

*Explanations of Mr. Key on certain points requested by counsel for the petitioners, which are also admitted as facts.*

1st. Mr. Key, in explanation, says he has declined practice in Washington county, District of Columbia, entirely. He does not suffer his name to appear to new business. In two or three important cases he has engaged to appear as counsel, and argue the cases when prepared for trial.

2d. Mr. Key has not practised in any county court of Maryland for many years, except in Montgomery, where he continues his full practice. On the destruction of the General Court, he has followed some interesting cases, in which he had been there employed, to the counties where they had been sent.

3d. Mr. Key's house in Montgomery was not plastered or painted when he first moved into it. The workmen did not finish it by six weeks so soon as they contracted to do, or he would have been in it six weeks sooner; the plastering would have been too damp, and fresh paint too unwholesome for his family and children; therefore, he removed into it unplastered and unpainted, from necessity, and the delay of the workmen. It is now plastered and painted.

P. B. KEY.

The committee further report that petitions signed by more than four hundred voters of Montgomery county, represent that Mr. Key had bought real estate in said county, had made considerable improvements thereon, built a commodious dwelling-house, and lived therein with his family and servants, before, at, and after said election; and that he was an inhabitant of the State of Maryland when elected a

Report of the  
committee,  
continued.

1808.  
10th Congress,  
1st Session.

Representative to Congress, and had often uniformly and publicly declared before that time his intention of becoming an inhabitant and resident of said county and State.

JANUARY 21, 1808.

The House went into Committee of the Whole on the preceding report and statement of facts.

Mr. RHEA moved to strike out of the resolution contained in the report, the following words: "having the greatest number of votes, and being qualified agreeably to the constitution of the United States;" which was agreed to.

A motion was then made to concur in the resolution as amended; whereupon, the following debate ensued:

Allegation that  
Mr. Key was,  
or had been, a  
British pen-  
sioner.

Mr. WITHERELL said he had heard it reported from a source which was entitled to credit, that Mr. Key, the sitting member, either now was, or had been, a British pensioner: this knowledge would bias his vote on the present question. He conceived that an inquiry ought to be had in this matter, as, were it true, it would certainly be a disqualification; he therefore moved that the committee should rise, for the purpose of recommitting the report.

Mr. KEY rose to second the motion of the gentleman from Vermont: it was his wish that a charge insinuated privately should be examined publicly. He himself had never concealed the foibles or follies of his early life; but he had, ever since he came into the councils of his country, relinquished all claim to any imaginary rank, and to any profit which he had derived from a foreign Government. He was convinced that the mode which had been adopted, of attacking him by insinuations, was peculiarly fatal; like the wound of the poisoned dart, which, though it heals to appearance, in time inflicts a certain death.

Messrs. DANA and SMILIE supported the motion for the purpose of investigating the allegation. Mr. GARDENIER opposed it.

Mr. KEY said, as these assertions had been made, it was surely incumbent on the House to examine into the facts, for, were the allegations true, it would be good ground on which to vacate his seat. It was true that when a person was once declared entitled to a seat, it required two-thirds of the House to expel him, but he would never take shelter under this provision. If a majority of the House thought he was not entitled to his seat, he would not hold it for a moment; but he wished that the matter should be investigated immediately, that the House might decide whether or not he was entitled to his seat; for, the impressions against him being removed, they could, without bias, decide whether or not he was, according to the report of the committee, duly elected. He was, therefore, in favor of the committee rising, to give an opportunity for investigation; he cared not for the mode of inquiry which should be afterwards adopted.

He understood that this matter had been hinted at in the Committee of Elections, but had been there abandoned for the want of foundation for the report. He had heard it asserted that when Mr. Monroe arrived, documents were expected to be received to prove the existence of such a fact. He knew that Mr. Monroe had been written to, and during the contest preceding Mr. K.'s election it had been industriously circulated and reiterated at every meeting against him. Mr. M. had returned from England, and had passed some time in this city, yet nothing had fallen from him to contradict the denial of these assertions which Mr. Key had made. His constituents knew the very circumstances of the follies of his early life, and his enemies had represented to them that having been once, twenty years ago, in the British army, he was not a proper person to represent them. The people scouted the idea, said Mr. K.; they knew me from my infancy, they knew my follies; but I had returned to my country, like the prodigal son to his father, had felt as an American should feel, was received, forgiven, and restored to the confidence of the people, of which the most convincing proof that could be adduced is my election to a seat in this honorable body.

Mr. MACON did not think this the proper way of getting at the proposed inquiry. He was opposed to blending the two cases together in deciding on the title of the gentleman from Maryland to his seat in the House. There was one question now before the House; by uniting the other with it, it might produce an improper bias on the mind of the House. A report was now made, and could be decided on, but if recommitted, the two distinct questions would be perplexed by being joined together. It was a rule in justice to a sitting member that decisions should be distinctly had on the specific facts stated by the persons contesting his election.

Mr. BACON said that the gentleman from North Carolina (Mr. MACON) had probably stated, with correctness, the general principles on which the House usually hold themselves bound in cases of this sort. That the reason why they usually confine themselves to the case stated by the Committee of Elections on the specific grounds of objection which had been laid before them by those who came forward to contest the election of a sitting member, was from a principle of justice to the member whose seat was in question, in order that he might not be surprised by objections which he could have had no fair opportunity to meet; but as this rule was adopted only from a regard to the rights of the sitting member, it could not surely be improper for the House to depart from it, when they had the consent of that member to do so. What was the state of the case now before the House? The gentleman from Vermont states, in his place, that he had been informed from a source which,

1848.

10th Congress,  
1st Session.Remarks on the  
charge that Mr.  
K. was a Bri-  
tish pensioner.



1838.  
10th Congress,  
1st Session.

Remarks on the  
motion to re-  
commit the re-  
port.

in his mind, entitled it to credit, that a fact existed in relation to the gentleman from Maryland who claimed a seat, which was not stated in the report of the Committee of Elections, but which would have a governing influence in determining the right of the member to retain his seat. This fact was denied by the latter, and an inquiry into the truth of it was solicited by him. Certainly, then, the House could not do justice either to themselves or the sitting member, without giving an opportunity for such inquiry; and if there was, as had been suggested, any departure from the customary course of proceeding in the mode proposed by the gentleman from Vermont, it was with the consent and desire of all the parties concerned, and it was a well known and correct maxim that consent took away error; he was therefore in favor of the motion now before the committee.

After some observations from Messrs. QUINCY and LYON in favor of the rising of the committee, in the course of which Mr. LYON observed that sixteen months had elapsed, in which time, had there been truth in the report, the opponents of the sitting member would have collected evidence in proof of it, and would have come forward on that ground to contest his election.

Mr. DAWSON said that the name of Mr. Monroe being mentioned on this floor by the gentleman from Maryland, (Mr. KEY,) in order, he presumed, to have some bearing on this question, or to make some impression on this House, he deemed it proper in him to state a fact. When Mr. Monroe was in this city, said Mr. D., I had a conversation with him on this subject, in which he stated that, while in London, he received one or more letters requesting him to make an inquiry at the proper office relative to Mr. KEY's situation with the British Government; but considering it not within his official duties, and for reasons conclusive in his judgment, he declined so to do: that he never did make the inquiry, and was totally uninformed on the subject. Mr. D. said he had thought it due to Mr. Monroe and to justice to make this statement, lest an erroneous impression should be made on the House.

Messrs. DESHA, SLOAN, GARDENIER, RHEA, and HOLLAND supported the motion for the rising of the committee, that an investigation might be had to do away unfavorable impressions from the existing report to the prejudice of Mr. KEY.

Mr. GARDENIER contended that every person was eligible to a seat in this House except expressly disqualified by the constitution. Now there was nothing in the constitution which disqualified a person from being elected a member on account of his receiving a pension from a foreign Government: so that, even were the report correct, it was not connected with the matter under consideration by the Committee of the Whole, which simply was whether Mr. KEY was duly elected. With regard, however, to the feelings and

prejudices of gentlemen, he should vote for the rising of the committee, because, though theoretically right, he might be practically wrong, and perhaps he ought not always to adhere too closely to correct principles.

1808.  
10th Congress,  
1st Session.

The committee then rose, and were refused leave to sit again.

The report was then recommitted to the Committee of Elections. Report recommitted.

“The report of the committee, made at a subsequent day, to the accuracy of which Mr. Key assented, was to this effect: That, subsequent to the declaration of independence, the said Philip B. Key joined the British army, and, in the year 1778, held a commission in a provincial regiment thereof; and that, at the surrender of Pensacola to the Spaniards, he was made prisoner, and sent to the Havana, whence he went to England on parole, and was never exchanged until the peace of 1783. When the peace took place, his corps was disbanded without rank, and the officers placed on half pay. In 1785, he returned to Maryland, being entitled to draw his half pay. In 1790, he settled in Annapolis; and, in 1794, he was elected to the General Assembly of Maryland, in which he served for that, and several succeeding years; that, previous to his first election in 1794, he sold his half pay to Gen. Forrest, his brother-in-law, who drew the same till the period of his bankruptcy in 1802, when, being greatly indebted to Mr. Key, he retransferred this half pay in satisfaction *pro tanto* of the debt. Feelings of friendship, however, to Gen. Forrest and his family, who were in a destitute condition, induced Mr. Key to permit him to draw the half pay to the time of his death, which happened in July, 1805. The six months' half pay, ending in December, 1805, was received by Mr. Key, being the last that he has received. Further report of committee.

“In January, 1806, Mr. Key wrote to his agent in London, directing him to call at the proper office, and, in his name, to resign all his pretensions to half pay, and to rank in the British army, if any were supposed to remain to him; and, in October, 1807, he made a similar and formal resignation, by a letter addressed to his Majesty's minister at Washington. It did not appear that Mr. Key had ever taken the oath of allegiance to the King of Great Britain, but that he had taken the oaths required by the laws of Maryland of persons in the public service of that State.

“In the conclusion of their report, the committee declare themselves to be of the ‘opinion that nothing in the evidence laid before them, so far as respects the suggestion of Mr. Key being a pensioner, or half pay officer to the King of Great Britain, authorizes them to alter the opinion, or the resolution submitted with their former report.’”

*Ordered*, That it be referred to the Committee of the Whole House.

1858.

10th Congress,  
1st Session.

MARCH 17.

On Mr. Rowan's  
motion to post-  
pone the sub-  
ject indefinitely.

In Committee of the Whole House,

Mr. ROWAN moved an indefinite postponement of the subject, and supported his motion on the ground that the decision of a question of fact, on a point of residence, rested properly and exclusively with the people, who were the best judges of it. As to the alleged pension—on which point, however, he had no doubt—if it were even true, neither the constitution, nor any law of the United States, makes it a disqualification for a seat, although it might be cause for a discussion what course should be pursued with a member, if actually in the receipt of a pension after he became a member. Mr. R. observed that an election would take place in the ensuing autumn, in which the people would have an opportunity of declaring their opinion by election or otherwise.

Messrs. EPPES, MARION, and W. ALSTON, opposed the motion, on the ground that a postponement of this subject would be a breach of duty. The constitution had made it their duty to inquire into an election of one of their own body whenever contested, and they should not shrink from it; that this provision was essential for the preservation of the purity of the House; that the subject should long ago have been decided on, and that the people could not perform what the constitution had made the positive duty of this House.

Mr. EPPES considered the decision on the motion more important than even the election itself, as establishing the precedent by which they might hereafter be tempted to throw the responsibility from themselves upon the shoulders of the people; he, therefore, called for the yeas and nays upon it.

Mr. ROWAN withdrew his motion, and the House adjourned.

MARCH 18.

Arguments in  
opposition to  
the report of  
the Committee  
of Elections.

In debate in Committee of the Whole House, the opponents of the report made by the Committee of Elections, contended that Mr. Key, having resided but two weeks in Maryland, immediately antecedent to the election, an affirmative decision of this resolution (to wit, that offered by the Committee of Elections) would fix a precedent to the future definition of the constitutional term of residence; that, hereafter, when the capital of the United States was, as it must be, a populous city, the influence and wealth of that city, and of the Government, as had been the case in Great Britain, might secure the election of any whom they should choose to send for a few days to reside in any State of the Union.

On the other hand, it was contended by Mr. Key and others that he had fixed a residence, purchased land, and built a house in Montgomery county, in Maryland, previous to his removal there; that it was his intention to have a fixed residence there, though he meant to reside in the winter months in Columbia, for the purpose of accomplishing the education of his daughters, and the convenience of business. This was said to be very different from a transient residence; and, even were a transient residence a sufficient qualification, the integrity of 3,000 freemen would always prove a sufficient barrier against corruption.

1808:  
10th Congress,  
1st Session.  
Views in sup-  
port of Com-  
mittee of Elec-  
tions' report.

On motion, the resolution of the Committee of Elections, as follows:

*"Resolved, That Philip B. Key, having the greatest number of votes, and being qualified agreeably to the constitution of the United States,* is entitled to his seat in this House," was amended, by striking out the words in italic, to which amendment the House agreed; leaving the resolution in the following form to wit:

*"Resolved, That Philip B. Key is* entitled to his seat in this House," in which form, it was passed by a vote of 57 to 52, and Mr. Key was consequently confirmed in his seat.

Philip B. Key  
entitled to his  
seat.

## ELEVENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
CLAY,  
STURGES,  
TROUP,

Mr. TAYLOR,  
VAN RENSSALAER,  
GARNETT.

### CASE XXIX.

CHARLES TURNER, jr. vs. WILLIAM BAYLIES, of Mass.

[A candidate is entitled to the benefit of all ballots which are manifestly intended for him, though they omit the addition of the word "junior," by which he is usually known.]

MAY 24, 1809.

The precision which has been observed in the different States in the election of officers, particularly as regards the identity of names, has been a fruitful source of contest among persons voted for. The instances are numerous in which the omission of the word "junior" has caused the canvassing judges to repudiate large masses of votes really designed for the candidate to whom that addition belonged; the effect of which has been sometimes, even in those States where an entire majority is required, to give the election in favor of him who had in truth, a minority of the votes. In the following case the House declared the rule to be, that the intention of the voters clearly ascertained, should govern: and this is a rule to which it will be found,\* in all subsequent cases they have conformed.

On the 24th May, Mr. BACON presented the petition of Charles Turner, jr. contesting the right of William Baylies to a seat in the House of Representatives, which was referred, together with divers memorials, to the Committee of Elections, who, on the 8th of June, made the following report:

Report of the  
Committee of  
Elections.

"The petitions signed by 1,231 inhabitants of the district of state, that at an election held for a member of Congress for the district of Plymouth, in the State of Massachusetts, agreeably to the law of that State, directing the time, place, and manner of electing members of Congress, on the first Monday of November, 1808, the whole number of votes

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\* In cases of contested elections in the British House of Commons, it has been decided that a mistake in the Christian name of a party returned, and likewise a false return, may be amended at the bar of the House.—*Hammond's Treatise on the Practice of Parliament*, p. 25.

given was 3,719; of which, agreeably to the laws of that State, 1,860 were necessary to make a choice. Of these there were given for Charles Turner, *junior*, Esq. 1,443 votes, and for Charles Turner, Esq. 430, amounting, if for the same candidate, to 1,873, which, being a majority of the whole number of votes, decided the election in favor of Mr. Turner, the candidate for whom the petitioners claim the seat, if he was the same person intended to be voted for, by the name and addition of Charles Turner, *junior*, Esq. and Charles Turner, Esq. The petitioners assert that Charles Turner, in whose behalf they claim the seat, is the same person for whom the votes were given, with the additions of *Esquire*, and of *junior*, *Esquire*; and, in proof of this, they assert that the laws of Massachusetts direct that the candidates voted for must be inhabitants of the district for which they may be elected, and that there was no other person legally qualified to be a candidate for a seat in Congress, inhabiting that district at the time of the election, but the same Charles Turner, for whom the petitioners claim the seat in Congress.

1809.

11th Congress,  
1st Session.Statement of  
facts by the  
committee.

“These assertions of the petitioners are proposed to be supported by testimony after due notice given to the sitting member, which has been admitted by the committee as correctly taken, but not acted on, with respect to the merits of the case.

“It appears that, by the law of Massachusetts, the Executive of that State decides on the election of members of Congress, and certifies the return; and, in this instance, the selectmen, who appear, by the law and custom of that State, to be official election officers in their respective towns or districts, had set down the votes received for Charles Turner, *junior*, Esq. and for Charles Turner, Esq. separate from each other, and that the Executive, in deciding on the election, had considered the votes as given for different candidates, and that on this supposition none of the candidates had a majority of the whole number of the votes given; and, therefore, directed that another election should be held in Plymouth district on the 19th of January, 1809, at which the sitting member had the majority of votes, and in consequence he was returned to Congress, by a certificate signed by the Governor.

By the election law of Massachusetts, the Governor of that State decides on the election, and certifies the returns.

“Before the committee examined maturely the documents, or deliberated on the merits of the case, the sitting member requested a postponement of the decision till the next session of Congress, in support of which he alleged that it is necessary to a full and fair investigation of the case, and to acquaint himself with the facts, and to be able to produce all evidence material to a correct decision of the question: that he was notified that his election would be contested but a short time previous to the meeting of Congress, and that he considered depositions taken without the direction of the

Sitting member requests further time to obtain testimony.



1809.  
11th CONGRESS,  
1st Session.

Committee propose to allow further time for testimony.

Additional report.

Statement of evidence produced.

House or their committee, as taken without the authority of law; that these circumstances prevented him from preparing himself so as to be able at this time to do justice to the case, or to those who had honored him with their suffrages.

“Without examining the merits of the case, the question was taken in the committee, on the request of the sitting member, to have the decision postponed, for the reasons hereinbefore stated, and carried in the affirmative.”

This report was committed to the Committee of the Whole House, and, after discussion, was recommitted by the House to the Committee of Elections. A subsequent report was made by the chairman on the 21st June, 1809. It repeats the former report in regard to the facts of the case, and adds the following: “That Charles Turner, of Scituate, had for a long time been known throughout the said district by the several descriptions of Col. Charles Turner, Charles Turner, Esq. and Charles Turner, junior, Esq.; that there was not in said district any other Charles Turner entitled to the addition of esquire; and that for many years there had not been any Charles Turner in said district older than Charles Turner, of Scituate, although he had continued to add junior to his signature since the removal of his father into the district of Maine, several years ago.

In support of these facts stated by the petitioner, Charles Turner, junior, who claims a seat in this House, produced a law of Massachusetts, passed June 27, 1794, and another law passed March 10, 1802, prescribing the time, place, and manner of electing Representatives to Congress, in both of which laws it is enacted and required that the persons voted for should be inhabitants of the district, and no instance of any practice to the contrary of these laws has been produced to the committee. He also produced one of the precepts issued by Lieut. Gov. Lincoln for calling the meeting in Plymouth district, on the 19th day of January last, in which precept the Lieutenant Governor had inserted the law. Also an attested copy of the schedule of the votes returned by the selectmen of the several towns in Plymouth district, in November last, by which it appears that the statement made by the petitioners as to the number of the votes, and in what manner they were returned, is correct; and, in support of the preceding statements and allegations, he produced the deposition of Augustus Clapp, who testifies that he has kept the post office in Scituate for the last six years, and that he had examined more than seventy letters received at that office, which, as appeared by the post mark, came from various towns in and out of Plymouth district, having all the various directions of Col. Charles Turner, jr. Esq., Col. Charles Turner, Esq., Col. Charles Turner, Charles Turner, jr. Esq., Charles Turner, Esq., and Mr. Charles Turner; that he had sent or delivered them to Col. Turner, of Scituate, not doubting that they were intended

for him ; that he had examined three letters from the Hon. Ephraim Spooner, one of the council, directed to Charles Turner, jr. Esq., and Charles Turner, Esq.

1809.  
11th CONGRESS,  
1st Session.

[The report here embodies a great mass of testimony, tending to show that the petitioner was familiarly known and addressed in his district by the name and addition of Charles Turner, *junior*, and also without such *addition* ; and that the votes given, both with and without it, were equally intended for him.]

The testimony is certified to have been taken before Nathan Willis, Esq., who appears by the certificate of the Governor, and of the Secretary of the commonwealth of Massachusetts, to be a justice of the peace, and an associate justice of the court of sessions within and for the county of Plymouth, in said State. It also appears that the said Willis, at the request of the said Turner, issued citations, dated 25th of March last, to William Baylies, Esq., the sitting member, requiring him to be present (if he saw cause) by himself, or his agent duly authorized, when and where the testimony of the witnesses was to be taken respecting the election which the claiming candidate proposed to contest ; in which citations the names of the persons to be examined, and the times and places where the examination was to take place, were inserted, allowing a competent length of time to be prepared.

Testimony, how  
taken, and of  
notice given to  
the opposite  
party.

The committee admitted the testimony above recited to have been correctly taken, notwithstanding the sitting member declined being present himself, or by his agent, he having been duly notified.

Testimony tak-  
en *ex parte*, af-  
ter due notice,  
admitted.

The aforesaid depositions are accompanied with official certificates of the decisions of the Senate of Massachusetts, in two cases, supposed by the claiming candidate to be similar to his case, and made under similar constitutional provisions.

The sitting member had also before the committee a certified return of the election held on the first Monday of November last, agreeing with the certificate accompanying the petitions, and likewise a certificate or schedule of the votes returned on the 19th day of January last, in which schedule it appears that the sitting member had 2,168, (being a majority of the whole number,) and the claiming candidate had 1,812 votes. He also exhibited the credentials of William Baylies, having been appointed and sworn into office as a justice of the peace for the county of Plymouth, and of his having been admitted an attorney by the Supreme Judicial Court, in neither of which is "*junior*." These are accompanied with a certified statement of the votes given in the second middle district of Massachusetts, in the year 1794, which he suggests to be similar to the case now before the committee.

Testimony pro-  
duced by sit-  
ting member.

The committee gave deliberate attention to the allega-

1899.  
11th Congress,  
1st Session.

Opinion of the  
committee fa-  
vorable to pe-  
titioner.

tions and arguments of both parties, and received from the sitting member in writing his reasons for requesting the decision to be postponed till the next session of Congress. They received from the claiming candidate his observations on the reasons offered by the sitting member. And the sitting member also protested against the committee going into the investigation of the evidence adduced by the petitioner. Having diligently attended to the allegations and arguments of both parties, and carefully examined the testimony produced, on mature deliberation, the committee submit the following resolutions to the decision of the House.

*“Resolved, That the election held in Plymouth district in November last was legal and proper.*

*“Resolved, That William Baylies is not entitled to a seat in this House.*

*“Resolved, That Charles Turner, junior, is entitled to a seat in this House.”*

*Ordered, That said report be committed to the Committee of the Whole House.*

JUNE 28.

In Committee of the Whole House, before the report of the Committee of Elections was read,

Mr. DANA moved that the committee rise, under a belief that time had not been allowed for the consideration of the report. He wished not to be driven in so great a hurry, to the decision of so important a question, which it was impossible to decide without mature consideration.

It was observed by Mr. BURWELL, that it was for the purpose of consideration alone, that the House went into committee; and that if a disposition was manifested to drive the House from the consideration of the subject, it might produce a counter determination to persevere in it.

Mr. DANA withdrew his motion.

The report and resolutions were then read, and Mr. Turner was admitted to a seat in the House during the discussion.

Mr. TAYLOR moved that the committee rise, with a view that the further consideration of the subject should be postponed to the next session.

The arguments which appeared to be most relied on by those who supported this motion, were, that the depositions and testimony taken in this case, although it was admitted that *reasonable* notice was given to the sitting member, who did not attend, were taken under the authority of no existing law, and are not such as would govern a court of justice; that the sitting member, not having attended at the time of taking the depositions, from a belief that they were illegal, the testimony was wholly *ex parte*; and, however decisive it was admitted by some gentlemen to be, was not

such as in candor or justice the House would decide on, without permitting the sitting member to bring testimony to rebut it. 1809.  
11th Congress,  
1st Session.

To this it was replied that, for several years, there had been no law prescribing the mode of taking testimony in cases of contested elections, in the course of which several cases had been decided by the House, on testimony taken under no law, but under the guidance of common reason; that, during the first session of the last Congress, the seat of Mr. Culpepper was vacated on testimony undoubtedly taken in this manner, and under no express law; and that the House having heretofore, in various cases, decided in this way, it was not to be expected that they would, in this instance, desert the principles on which they had acted.

Other arguments, however, founded on facts stated by the sitting member and the petitioner, were introduced into the debate by gentlemen speaking on both sides of the question.

On the question, Shall the committee rise? it was carried by a vote of 58 to 33, and leave to sit again was refused. [See National Intelligencer, 26th of June, 1809.]

On the 27th of June, a motion was made in the House to postpone the consideration of the report indefinitely, which being decided in the negative, the question recurred on the first resolution, when a motion was made to amend it by inserting after the words "*legal and proper*," these words, "*but not conclusive*." This motion was decided to be out of order, and finally the question was taken on the resolution, and carried; Yeas 58; Nays 13.

The second resolution was decided in the affirmative; Yeas 60; Nays 40.

The third was also carried; Yeas 62; Nays 41.

Whereupon, the said Charles Turner, junior, appeared, C. Turner, jr.  
admitted to his  
seat. was qualified, and took his seat.

# ELEVENTH CONGRESS—SECOND SESSION.

## COMMITTEE OF ELECTIONS.

Mr. CLAY,  
STURGES,  
TROUP,

Mr. TAYLOR,  
VAN RENSSELAER,  
GARNETT.

### CASE XXX.

THOMAS RANDOLPH *vs.* JONATHAN JENNINGS, *Delegate from Indiana.*

[It was alleged in this case that a part of the votes constituting the sitting member's majority were not properly certified by the poll-keepers, agreeably to the law of the Territory, and that they ought not to have been received. And it was further alleged that two districts of a county were prevented from voting by the omission or mistake of the sheriff. The report of the committee was adverse to the sitting member, but was not concurred in by the House.

"The ground on which the Committee of Elections have reported against the right of Mr. Jennings to his seat is, that the proclamation of the Governor directing the election of a Delegate was illegal, having been grounded on a liberal construction of the laws of Congress, taking their probable intention into view, instead of following the letter of the law. The committee did not examine into the alleged irregularities attending the election when held, resting their report on the illegality of the proclamation of the Governor, under which the election was held."]

(See National Intelligencer of the 12th January, 1810.)

On the 22d day of December, 1809, the committee made the following report:

Report of committee.

That they have maturely examined the documents committed to them by the House, and also the allegations of the petitioner and of the sitting Delegate. The documents are,

1st. The official certificate of the Governor of the Territory of Indiana, testifying that Jonathan Jennings was, on the 22d day of May, 1809, duly elected a Delegate to Congress for that Territory.

2d. A memorial of Thomas Randolph, praying that the seat of Jonathan Jennings may be vacated, for the following reasons, to wit. That though it does appear, by the official return, that Jonathan Jennings had a majority of thirty-nine votes, there ought, in the opinion of the petitioner, to be deducted from the votes counted by the sitting member ninety-one votes taken in the seventh district of Dearborn, the return copy of which was not certified by the poll-keepers, as the law directs; and also that two districts in the said county of Dearborn were prevented from voting, through

the omission or mistake of the sheriff, who did not appoint deputies to be judges of the election, or whose appointment was not attended to as it ought to have been; in which districts the petitioner is of opinion that he could have had the majority of votes.

1809;  
18th Congress,  
2d Session.  
Report of the  
Committee of  
Elections.

The petitioner further states that it is not his intention on these grounds to claim a seat in this House, when in fact he had not a majority of votes, but that it is his wish that the voice of the people should be legally and truly heard; and, in support of the prayer of his petition, he refers to the memorial of the Legislature of the Territory, transmitted to the House, and referred to the Committee of Elections.

3d. A document purporting to be a petition of the Legislative Council and members elected to serve in the House of Representatives, and not objected to by the parties, states that, from a deliberate view of the act of Congress dividing the Northwestern Territory, the ordinance for the government of the Indiana Territory, regulating elections, and the law of Congress extending the right of suffrage to the citizens of the Territory, they find that considerable doubt existed in the minds of the minority with respect to the constitutionality of the meeting of the General Assembly of the Territory. And they further state that, in the year 1805 there was a Legislature organized under the law dividing the territory northwest of the Ohio river: that, in the year 1808, the Governor dissolved the said Legislature: that, on the 3d day of February, 1809, the law of Congress dividing the Indiana Territory was enacted: that, on the 4th day of April, 1809, the Governor issued his proclamation for the election of an additional number of members of the Legislature, sufficient to supply the place of those struck off by the division of the Territory, corresponding with the law of 1805, on the authority of which the General Assembly was first organized, viz. eight Representatives. But the law passed the 27th of February, 1809, extending the right of suffrage to the citizens of Indiana, declaring how the Legislature shall be organized, after the passage of the said law, that is, that the General Assembly shall apportion the members to the House of Representatives to consist of not less than nine, nor more than twelve members. That the law was evidently predicated on the principles that a Legislature was in existence at the time of its passage, or that a Legislature might be convened under the authority of the Governor's proclamation; but the fact was different, for the old Legislature was doubly dissolved, first by the Governor, as above stated, and again by the division of the Territory, which struck off three members of the House of Representatives and two of the Legislative Council. Thus there was no Legislature in being to make the apportionment, agreeably to the act of Congress.

The petition, after farther explanations, goes on to state,



# ELEVENTH CONGRESS—SECOND SESSION.

## COMMITTEE OF ELECTIONS.

Mr. CLAY,  
STURGES,  
TROUP,

Mr. TAYLOR,  
VAN RENSSELAER,  
GARNETT.

### CASE XXX.

THOMAS RANDOLPH vs. JONATHAN JENNINGS, *Delegate from Indiana.*

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1st. The official certificate of the Governor of the Territory of Indiana, testifying that Jonathan Jennings was, on the 22d day of May, 1809, duly elected a Delegate to Congress for that Territory.

2d. A memorial of Thomas Randolph, praying that the seat of Jonathan Jennings may be vacated, for the following reasons, to wit. That though it does appear, by the official return, that Jonathan Jennings had a majority of thirty-nine votes, there ought, in the opinion of the petitioner, to be deducted from the votes counted by the sitting member ninety-one votes taken in the seventh district of Dearborn, the return copy of which was not certified by the poll-keepers, as the law directs; and also that two districts in the said county of Dearborn were prevented from voting, through

the omission or mistake of the sheriff, who did not appoint deputies to be judges of the election, or whose appointment was not attended to as it ought to have been; in which districts the petitioner is of opinion that he could have had the majority of votes.

1809;  
18th Congress,  
2d Session.

Report of the  
Committee of  
Elections.

The petitioner further states that it is not his intention on these grounds to claim a seat in this House, when in fact he had not a majority of votes, but that it is his wish that the voice of the people should be legally and truly heard; and, in support of the prayer of his petition, he refers to the memorial of the Legislature of the Territory, transmitted to the House, and referred to the Committee of Elections.

3d. A document purporting to be a petition of the Legislative Council and members elected to serve in the House of Representatives, and not objected to by the parties, states that, from a deliberate view of the act of Congress dividing the Northwestern Territory, the ordinance for the government of the Indiana Territory, regulating elections, and the law of Congress extending the right of suffrage to the citizens of the Territory, they find that considerable doubt existed in the minds of the minority with respect to the constitutionality of the meeting of the General Assembly of the Territory. And they further state that, in the year 1805 there was a Legislature organized under the law dividing the territory northwest of the Ohio river: that, in the year 1808, the Governor dissolved the said Legislature: that, on the 3d day of February, 1809, the law of Congress dividing the Indiana Territory was enacted: that, on the 4th day of April, 1809, the Governor issued his proclamation for the election of an additional number of members of the Legislature, sufficient to supply the place of those struck off by the division of the Territory, corresponding with the law of 1805, on the authority of which the General Assembly was first organized, viz. eight Representatives. But the law passed the 27th of February, 1809, extending the right of suffrage to the citizens of Indiana, declaring how the Legislature shall be organized, after the passage of the said law, that is, that the General Assembly shall apportion the members to the House of Representatives to consist of not less than nine, nor more than twelve members. That the law was evidently predicated on the principles that a Legislature was in existence at the time of its passage, or that a Legislature might be convened under the authority of the Governor's proclamation; but the fact was different, for the old Legislature was doubly dissolved, first by the Governor, as above stated, and again by the division of the Territory, which struck off three members of the House of Representatives and two of the Legislative Council. Thus there was no Legislature in being to make the apportionment, agreeably to the act of Congress.

The petition, after further explanations, goes on to state,

1809:  
11th Congress;  
2d Session.

Report of the  
Committee of  
Elections.

that after the General Assembly was convened, the minority of the Representatives not conceiving themselves authorized to go on in legislative business, the Legislature agreed to postpone doing any business except apportioning an additional member to make the number nine, agreeably to the law of Congress extending the right of suffrage to the Territory.

The above petition is accompanied with a document purporting to be a resolution of the General Assembly requesting the Governor to dissolve the Assembly, and to proceed as speedily as may be to organize another under the provisions of the act of Congress.

4th. In support of the irregularities in the election, stated by the petitioner, he produced to the committee a certificate signed by the clerk of the court of Dearborn county, testifying that there were two districts in said county in which the citizens were prevented from voting, through the omission or unintentional mistake of the sheriff.\* He also produced a return of the election held in the seventh district of Dearborn county, in which the signatures of the poll-keepers, required by the law of that Territory, are wanting; but it is certified by the judges of the election to be a true test of the votes taken under their inspection on the 22d day of May, 1809, and certified by the Secretary of the Territory to be a true copy.

The petitioner also produced a certified notice, given to Jonathan Jennings, of his intention to contest his election, and that for that purpose he would apply on the first Tuesday of September next at the court-house in the town of Vincennes, where the sitting member might attend; and further adds, that there are other grounds upon which he shall contest his election, and says that of this due notice shall be given; but these other grounds have not been stated to the committee, nor any further notice to the sitting member produced.

In reply to these objections to his election, the sitting Delegate complains that he had neither notice nor opportunity to have the alleged irregularities examined. He admits that two districts in Dearborn county were prevented from voting, as stated by the petitioner; but says he could prove, if he had an opportunity, that there did not more than fifteen attend at the places of election who had a right to vote, who, if they had all voted for the petitioner, which he does not admit, would not have altered the state of the poll. He further alleges that, if opportunity had been allowed, he could have proved that the poll-keepers at the election held in the seventh district of Dearborn county did their duty according to law, though their signatures do not appear along with those of the judges in the copy before the com-

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\* See a like instance of omission in the case of Lyon vs. Smith, *ante*, p. 101.

mittee. He further says that he is informed that, if he had an opportunity, he could prove that the election in Knox county, where the petitioner had all the votes, was not conducted according to law. This fact the petitioner admits, and the sitting member claims an opportunity to examine the facts alleged in opposition to his right to a seat in the House.

1809.  
11th Congress,  
2d Session.  
Report of the  
Committee of  
Elections.

The petitioner does not ask the election to be declared void on account of the want of legal authority vested in the Governor. He, before the committee, argued in support of the Governor's authority to order the election by proclamation, and rests his plea solely on the irregularities he has specified.

The sitting Delegate also advanced the legal authority of the Governor to organize the Legislature, and to direct the election of a Delegate, in argument before the committee, and in a written paper reported along with the documents.

Besides the opinion of the General Assembly, in their petition, expressing a doubt of the authority by which they were convened, the Governor himself, in what is submitted to the committee as the Governor's speech at the opening of the General Assembly, convened by his own authority, expresses a doubt of his authority, but goes on to support it by a liberal construction of the law of Congress for extending the right of suffrage to the Territory.

The committee, after deliberate examination of the laws relative to the Indiana Territory, consider it to be their duty to investigate the authority under which the election of a Delegate to represent that territory was held, previous to an examination of the irregularities suggested, because, if the election was held without authority of law, it was void, without regard to irregularities; and on this investigation, they discovered that the Governor had, on the 26th of October, 1808, dissolved the Legislature, but that at that period his power to organize it again remained unimpaired. They also found that by the act of Congress, erecting the Illinois Territory into a separate territory, five members of the Representatives, with the districts which they had represented, were taken away from the Indiana Legislature, and two of the Legislative Council, by which act the Legislature of the Indiana Territory was not only dissolved but abolished, and no power vested in the Governor to revive it, because the power vested in the Governor with relation to the Northwestern Territory, could not be applied to the Governor of the Indiana Territory. The saving clause, viz. that nothing in the act dividing the Indiana Territory, shall be construed in any manner to affect the Government now in force in the Indiana Territory, cannot, by any reasonable construction, be applied further than to protect the Executive and judiciary of that Territory, because there was no Legislature in existence at the time at which the Territory was divided: and because the act of Congress, passed

## TWELFTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. FINDLEY,  
STURGES,  
MACON,  
TROUP,

Mr. PLEASANT,  
EMOTT,  
FISK.

### CASE XXXI.

#### JOHN TALIAFERRO vs. JOHN P. HUNGERFORD, of Virginia.

[In Virginia the land list of the year prior to an election is a proper test, as *prima facie* evidence of the qualified voters in a county, but it is not conclusive. *Quere*, as to the time allowable for taking testimony.]

NOVEMBER 7, 1811.

The petition of John Taliaferro, with documents, was referred to the Committee of Elections. On the 21st November, 1811, the committee reported,

Report of the  
Committee of  
Elections.

That, at the last general election in Virginia for Representatives to Congress, the said John Taliaferro and John P. Hungerford were opposing candidates in the district composed of the counties of Westmoreland, Richmond, Lancaster, Northumberland, King George, and Stafford. From the polls of the several counties the sitting member appears to have obtained a majority of six votes in the district, and he was accordingly returned as elected.

That, of the polls taken for the county of Westmoreland, John Taliaferro had 37 votes, and John P. Hungerford 316 votes; and that, in comparing the polls with the land list of 1810, and taking the list as a test, it appears to the committee that 9 persons who voted for the former, and 162 persons who voted for the latter gentleman, were not qualified to vote. That, of the polls taken for the county of Richmond, Mr. Taliaferro had 103 votes, and Mr. Hungerford 130 votes, and that, on such comparison as aforesaid, 12 persons who voted for the former, and 38 persons who voted for the latter gentleman, appear not to have been qualified voters.

That, of the polls taken for the county of Lancaster, Mr. Taliaferro had 122 votes, and Mr. Hungerford 96 votes, and that, on such comparison as aforesaid, 20 persons who voted for the former gentleman, and 20 who voted for the latter, appear not to have been legally qualified voters.

That, of the polls taken for the county of Northumberland, Mr. Taliaferro had 228 votes, and Mr. Hungerford 76 votes, and that, on such comparison as aforesaid, 35 persons who voted for the former gentleman, and 1 person who

voted for the latter, appear not to have been legally qualified voters.

1811.  
12th Congress,  
1st Session.

That, of the polls taken for the county of King George, Mr. Taliaferro had 114 votes, and Mr. Hungerford 125 votes, and that, on such comparison as aforesaid, 38 persons who voted for the former gentleman, and 50 who voted for the latter, appear not to have been legally qualified voters.

Report of the  
Committee of  
Elections.

That, of the polls taken for the county of Stafford, Mr. Taliaferro had 159 votes, and Mr. Hungerford 26 votes, and that, on such comparison as aforesaid, 29 persons who voted for the former gentleman appear not to have been legally qualified voters.

The result of such an examination and comparison is, that, deducting for both polls, the persons challenged who do not appear to have been qualified to vote according to the land lists of 1810, Mr. Taliaferro has a majority over Mr. Hungerford of 121 votes.

The committee further report that, on the 7th day of May last, the petitioner gave notice to the sitting member of his intention to contest the election, on the ground that the former had a majority of the legal and qualified votes, and that such notice was accompanied by a list of the persons challenged by the petitioner, with his objections to them. On the 28th of May, the sitting member furnished the petitioner with a list of the persons challenged by him, setting forth his objections against such voters. These lists contain as well the names of the persons whom the committee find not to be on the land lists, as others who are challenged by the parties for want of the freehold qualification, and for other causes.

That, on the 27th day of September last, the petitioner gave notice in writing, subscribed by him, to the sitting member; that testimony would be taken in relation to the present controversy, to be used in the decision of the same, at King George Court-house on the 10th, at Westmoreland Court-house on the 17th, and at Richmond Court-house on the 22d of October, and that the petitioner, agreeably to such notice, has taken sundry depositions which are now before the committee; but the sitting member did not attend such examination, for reasons stated by him in a protest which he caused to be delivered to the petitioner.

The committee further state that they have made the comparison of the polls with the land lists, at the particular request of the petitioner, and for the purpose of reducing the controversy before them as much as possible; and that they were induced to this course from adopting, as a principle, that, according to the laws of Virginia, the land list of the year prior to the election is, in the first instance, to be received as evidence of all the freeholders in the county; but this evidence they conceive, and so it was admitted by the parties, is only conclusive in the absence of all other evidence; and they accordingly are of opinion that it is com-

The land lists are *prima facie* evidence of the property qualification of voters.



1811.  
18th December,  
1st Session.

Report of the  
Committee of  
Elections.

petent for the parties to show, by other testimony, that persons appearing on the land lists are not freeholders, and thus not entitled to vote; and, on the other hand, that persons not appearing on the land lists are freeholders and voters.

The sitting member, before such examination was gone into, asked for time to take testimony, under the conviction that, in a reasonable period, to be fixed by the committee, he would be able, by evidence to be taken, to support his challenges and his poll, and he still requests such time to be allowed him: the petitioner, on the other hand, has at all times opposed such request, on the ground that the sitting member has had sufficient time, since he was apprised that the election would be contested, to procure his testimony.

Quere, whether further time shall be allowed the sitting member to obtain testimony.

The committee are aware that some inconvenience must arise to the petitioner, if this contest is laid over for any time, but they think the right of suffrage ought not to be hazarded or destroyed on account of any individual inconvenience. If there has not been gross neglect in the sitting member, the committee conceive that it is due to the electors of the district who polled for him, and to himself, not to hurry his case to a decision, without giving them and him an opportunity to make good the election if they can do it.

It has been already stated that the petitioner gave notice of his intention to contest the election to the sitting member on the 7th of May, and this the former contends was sufficient to put the latter to the task of collecting and arranging his proofs; your committee see, however, that the proceeding was modelled on the laws and usages of Virginia, and, according to them, it is regarded as a mere incipient step, calling for no proceeding from the other party. Such a notice, on the heel of a contested election, is an index to the feelings of the person giving it, but not always the proof of a settled determination. As the period of the election recedes, and the difficulties attending a canvass become more apparent, the unsuccessful candidate sometimes abandons his notice and his scrutiny. It ought not, therefore, to be required of the person returned, for such cause alone, to wade through all the trouble, difficulty, and expense of a tedious examination, while it remains doubtful whether his opponent will proceed. It is surely in season to begin to take defensive testimony when the opposing party has commenced the investigation.

As to defensive testimony, see Varnum's case, ante, p. 112.

Of the notice given prior to the taking of the testimony by petitioner.

The notice given by the petitioner on the 27th of September, for the examinations on the 10th, 13th, and 22d of October, the committee have accordingly regarded as the first efficient measure towards the scrutiny, and they are satisfied that, in a district composed of six counties, and in a case where the votes challenged exceed four hundred, it was not practicable for the sitting member to take his testimony in season for the commencement of this session. A notice given by him after the 29th of September, would not have been deemed reasonable for an earlier day than the 10th of

October, nor would it have been allowed in him to call the petitioner from his own examinations, which were to continue until after the 22d of October: it is not possible to conceive that the sitting member would procure his evidence, allowing him time, before the first day of the session, to travel to the seat of Government.

1811.  
12th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections.

The committee, in addition to the facts already stated, report that it appears to them that, on the 29th day of April last, being the day of the canvass, the petitioner procured the certificates, under oath, of the sheriffs, and two of the deputy sheriffs, (who attended to compare the polls,) that if an equality of votes had appeared, they would have voted for the petitioner; which certificate was transmitted by the magistrate before whom it was attested, to the Clerk of this House, at the request of Mr. TALIAFERRO, to be retained until called for by him.

This the petitioner alleges ought to be regarded as the commencement of his testimony, and he contends that it not only advised the sitting member, that his seat would be contested, but made it necessary for him forthwith, and without further notice or act on the part of the petitioner, to proceed to his examinations. The committee, however, have nothing before them, which goes to show distinctly the object of the petitioner in procuring the certificate; nor can they, in any point of view, consider this as such a prelude to the scrutiny as to require from the sitting member that he should proceed to his canvass.

The committee, therefore, upon a view of all the circumstances of the case, are of opinion that further time ought to be granted to the sitting member to procure testimony, and they accordingly submit the following resolution:

The committee propose that further time be allowed the sitting member to procure evidence, but the House refuse time, and resolve that the petitioner is entitled to his seat.

*Resolved*, That a reasonable time be allowed John P. Hungerford, a member of this House, to procure testimony relative to his election, and that the Committee of Elections have power to examine witnesses, and to make order for such examinations in the case of the said election.

This report was committed to the Committee of the Whole House, and, after a consideration of two days, leave to sit again was refused.

On a motion in the House to concur with the Committee of Elections in their closing resolution, it was, by a vote of 46 to 65, determined in the negative, and a motion to recommit the subject to the same committee was also lost.

The two following resolutions being then proposed, to wit:

1. "*Resolved*, That John P. Hungerford is *not* entitled to a seat in this House.

2. "*Resolved*, That John Taliaferro is entitled to a seat in this House."

The first was carried by a vote of 67 to 29, and the second by a vote of 66 to 19.

And thereupon John Taliaferro took his seat, &c.

# THIRTEENTH CONGRESS—FIRST SESSION.

## COMMITTEE OF ELECTIONS.

Mr. FISK, of Vt.  
BURNWELL,  
DAVENPORT,  
ANDERSON,

Mr. CONDUCT,  
AVERY,  
PICKERING.

## CASE XXXII.

### JOHN TALIAFERRO vs. JOHN P. HUNGERFORD, 2d contest.

[In the opinion of the committee, the law of Virginia directing that the names of the voters shall be entered by the poll-keepers *duly* in distinct columns, is not satisfied by the insertion of the surname only, or by the prefix of the initial letter of the Christian name with it, but the whole name should appear. This opinion was overruled by the House. The land lists are not conclusive tests of the qualifications of voters : parties may resort to evidence *aliunde* to sustain their challenges.]

At the first session of the thirteenth Congress, John Taliaferro, of Virginia, again contested the return of John P. Hungerford, as a member from that State, he having been a second time chosen; and, on the 10th of June, 1813, the Committee of Elections made the following report, to wit:

Report of committee.

That, at the last congressional election in that State for Representatives, the said John P. Hungerford was returned as elected from the district composed of the counties of Westmoreland, Richmond, Lancaster, Northumberland, King George, and Stafford. The petitioner was also a candidate. The laws of Virginia prescribing the manner of conducting such elections, direct that "the clerks of the polls shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person. They further direct that "the clerks of the polls having first signed the same, and made oath to the truth thereof, a certificate of which oath, under the hand of the magistrate of the county, shall be subjoined to each poll, shall deliver the same to the sheriff," &c.

Upon inspecting the polls of the several counties, the following facts appear:

Facts of the case. Irregularities attending the election stated.

In Westmoreland the names of the voters are all entered in one general column on the left hand margin of the book, and figures in numerical order, instead of the names of the voters, are inserted in the columns under the names of the candidates, as evidence for whom each vote is given.

In Richmond the votes are registered in one column, and a straight mark, instead of the name of the voter, is in-

serted under the name of the candidate. In Stafford the Christian name of the candidate is not written on the poll; the initial letter only is given. The same occurs partially in Lancaster.

1813.  
13th CONGRESS,  
1st Session.

Report of the  
committee.

On the polls of Westmoreland, Richmond, Lancaster, and Stafford, no certificate is found of any oath having been administered to the clerks keeping the same.

The petitioner contends that the irregularities and deviations from the express provisions of the law, are of such a nature as to render void the election, and require a new one to be held.

Irregularities in  
the election  
complained of.

On the other hand, it is argued by the sitting member that most of the proceedings objected to are justified by general practice; and that the manner of keeping the poll, by entering the names of all the voters in one general column, is sanctioned by long usage; and that in Stafford the initial only of the Christian name of the electors had been entered on the polls for several past elections.

The committee are sensible that trivial errors, committed by the officers conducting elections, resulting, perhaps, from a misconstruction of a doubtful passage of a law, ought not to deprive any class of citizens of representation. Still it must be manifest that, to preserve the elective franchise pure and unimpaired, the positive commands and requirements of the law, in respect to the time, place, and manner of holding elections, ought to be observed.

To enter the names of the voters promiscuously in one margin of the poll book, when the law positively directs them to be "entered in distinct columns," and "under the name of the candidate voted for," is as manifest a departure from the law as the selection of another time, or another place, than that mentioned in the law. Nor can the committee conceive that the prefixing the initial only of the Christian name to that of the family or surname of the voter, is a fair compliance with the spirit and intent of the law, which declares "that the names of the voters shall be *duly* entered in distinct columns," &c. It is presumed that the object of the law, in having the name *duly* entered, is to exhibit to the country, on a scrutiny, who are the persons voting, and to test their title to a vote, by comparing the poll with the land roll.

Opinion of the  
committee up-  
on the irregu-  
larities com-  
plained of.

And, when, for example, the initial letter is "J," it must be obvious that it may be taken to stand for John, or Joseph, or Jonathan, or Isaac, or Joshua, and it would require no small share of perseverance and industry to contest an election where such endless uncertainty stands in the way of examination.

The committee have not been satisfied that such irregularities have ever been sanctioned, on a scrutiny, either by the Legislature of Virginia, or of the United States. When opposing candidates have not objected to them, they may

In the view of  
the committee  
the irregulari-  
ties were such  
as to vitiate the  
election.

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have passed *sub silentio*. We feel no hesitation in saying that custom ought not to justify a departure from the letter and spirit of positive law.

Upon a view of the whole ground, the committee, convinced of the importance of adhering strictly to the provisions of positive law, as well as of the irregularities in conducting this election, respectfully submit the following resolutions:

“*Resolved*, That the said election held in the aforesaid district in April last was illegal, and ought to be set aside.

“*Resolved*, That John P. Hungerford is not entitled to a seat in this House.”

The House do not concur in opinion with the committee, but order the report to be recommitted. Committee's second report, with a statement of the evidence.

In these resolutions the House, by a vote of 78 to 52, refused to concur; and, on the 16th June, 1813, the report was, on motion, recommitted to the same committee, who, on the 28th, submitted their second report as follows, to wit:

That, from the polls of the several counties, the sitting member appears to have obtained a majority of twenty-four votes in the district.

The petitioner claims the seat on the ground that a majority of the legal votes at said election were given for him; and, as evidence to support his claim, produced the land list of 1812, with a copy of the poll taken in each county in the district at said election. That, on comparing the polls of each county with the aforesaid land list, and taking that as the test, it appears that 193 persons who voted for the petitioner, and 234 persons who voted for the sitting member, were not qualified to vote: that, deducting from both polls the persons challenged, who do not appear to have been qualified to vote according to the land list aforesaid, there is left for Mr. Taliaferro a majority of 17 votes over Mr. Hungerford. The petitioner contends that the difficulties of ascertaining the names, places of abode, and property of the voters, presented by the omission of duly entering their names on the poll book, forbid the hope of a fair and successful scrutiny of the poll by means of any other evidence than that of comparing it with the land list, on which alone ought the merits of his claim, and the right of the sitting member to his seat, to rest. But the committee were of opinion that it was competent for the parties to support their challenges and polls by other evidence, and therefore admitted the accompanying affidavits, with the testimony of Henry Lee, junior, Daniel C. Brent, and John Cook, (the two latter gentlemen produced by the petitioner,) as sufficient to support 43 of the votes on his poll, that were challenged by the petitioner, and not found on the land list aforesaid. And the petitioner, by the testimony of the said Lee, Brent, and Cook, proved the legality of 15 votes found on his poll, challenged by the sitting member, and not found on the land list. That, by adding the aforesaid 43 votes to the poll of Mr. Hungerford, and the said 15 votes to the poll of Mr.

The property qualification of voters may be proved by affidavit, as well as by the test of the land list.—See Porterfield vs. McCoy.

Taliaferro, there is left for the former gentleman a majority of 11 votes over the latter.

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The petitioner contends that the evidence exhibited by the affidavits fell far short of supporting the votes it was intended for, because it did not show that the voters had the possession of the *freehold title* to their lands, as well as of the land itself in right of which they voted, six months prior to the day of said election, and which, as he alleged, the laws of Virginia required to entitle them to vote, except in cases where they came into possession of the land by marriage, descent, or devise. If this construction of the law, which the strict letter of it seems to warrant, had been adopted by the committee, it would have left fourteen of the aforesaid forty-three votes, given for Mr. Hungerford, unsupported, and to the petitioner a majority of four votes; but, from the best information the committee could obtain of the construction given this law, by the usage of the Virginia Legislature, a majority were inclined to the opinion that the spirit and intention of the law were satisfied when the voter had been six months in the actual possession of the land, and obtained his freehold title to the same any time previous to his voting.

Second report  
of committee.

Six months' pos-  
session of land  
prior to elec-  
tion, if he ob-  
tain the free-  
hold at any time  
before the elec-  
tion, qualifies  
a voter.

From the above statement of facts, the committee are of opinion that the petitioner has not supported his petition.

That the peti-  
tioner has not  
supported his  
petition.

This report was debated in the House on the 2d and 31st days of July, 1813; and on the latter day, it was, on motion, *ordered*, that the further consideration thereof be postponed until the 1st day of the succeeding session of Congress.

Consideration  
of report post-  
poned to 2d  
session of 13th  
Congress.

At the second session of the thirteenth Congress, the case having been referred to the Committee of Elections, their supplementary report was, on the 10th of January, 1814, submitted to the House, as follows:

That, at the last session of Congress, a final report was made on the case, and it does not appear that the petitioner was apprised of, or expected, that the parties would have been indulged with the admission of new evidence, and a further hearing at this session. Yet as the House have seen proper to refer the subject again to the committee, they felt bound to receive all proper testimony which should be presented to them, and accordingly received from the sitting member a number of depositions, taken in July last, in pursuance of previous notice given by him to the petitioner, which support eleven of the votes on the poll of the sitting member, not found on the land list, nor supported by former testimony. Adding these to the forty-three votes, supported by him at the last session, gives him a majority of twenty-two votes over the petitioner. For a more particular statement of the poll in this case, the committee beg leave to refer the House to the second report made thereon at the last session.

Supplementary  
and third re-  
port of the Com-  
mittee of Elec-  
tions.

But after the most mature consideration the committee have been able to give this case, a majority are of opinion



1813. **that this election is void, and ought to be set aside, because**  
 12th Congress, it was conducted in an irregular manner, contrary to the law  
 1st Session. of Virginia, prescribing the manner of conducting such elec-  
 Committee ad- tions, as is more particularly set forth in the first report made  
 here to their in this case by the Committee of Elections at the last session,  
 opinion that the to which your committee beg leave to refer the House, and  
 election is void respectfully submit the following resolutions:  
 for irregularity, but this opinion  
 does not re- “ Resolved, That the said election was illegal, and ought  
 ceive the sanc- to be set aside.  
 tion of the “ Resolved, That John P. Hungerford is not entitled to a  
 House. seat in this House.”

Sitting member On the 1st of February, 1814, the Committee of the Whole  
 confirmed in House reported their disagreement to the resolutions of the  
 his seat Committee of Elections; and on the 17th of February, the  
 House, concurring with the Committee of the Whole, affirm-  
 ed the right of John P. Hungerford to his seat.

### CASE XXXIII.

**BURWELL BASSETT vs. THOMAS M. BAYLEY, of Virginia.**

[The official return of votes is to be taken as *prima facie* evidence of their  
 legality.]

The sheriff has no discretion to continue the polls open, but upon the  
 contingencies mentioned in the law: whether more voters appear than can  
 be polled in one day, is a mere question of fact, allowing no discretion what-  
 ever in the officer.]

JUNE 3, 1813.

The petition of Burwell Bassett was presented, and refer-  
 red to the Committee of Elections.

The report of the committee, made in this case on the 3d  
 of June, 1813, was as follows, to wit:

Report of the That at the last general election in Virginia for Represen-  
 Committee of tatives to Congress, the said Burwell Bassett and the said  
 Elections. Thomas M. Bayley were opposing candidates, in the district  
 composed of the counties of Middlesex, Matthews, Gloucester,  
 Warwick, Accomac, Northampton, James City, Elizabeth City,  
 and the city of Williamsburg. From the poll of the several  
 counties, the sitting member appears to have had a majority of  
 fifty-seven votes in the said district, and he was accordingly  
 returned as elected.

The laws of Virginia prescribing the mode of conducting  
 such elections, direct that the sheriff, or other officer con-  
 ducting the poll, shall close it the same day, unless the elec-  
 tors be prevented from attending by rain, or the rise of  
 watercourses, or unless there be more electors attending  
 than can be polled in one day. It appears that neither rain,  
 nor the rise of the watercourses, prevented the electors

from attending on the first day of the election, in the county of Accomac. Yet the poll in this county was continued three days; for what cause, does not appear. It is contended by the petitioner that there is no evidence that this continuance was for a cause warranted by law, and, therefore, that it ought to be presumed illegal, the election void, and a new one ordered.

1813.  
15th Congress,  
1st Session.

Report of committee.

It is urged on the other hand, by the sitting member, that, until disproved, the officer's return, who conducted the election, ought to be respected as *prima facie* evidence of the legality of the proceedings; and the committee are unanimously of this opinion.

The official return is *prima facie* evidence of the legality of an election.

That, of the polls taken for the county of Accomac, Burwell Bassett had 61 votes, and Thomas M. Bayley 735 votes; 109 of the latter are challenged as illegal by the petitioner, who presented a list of their names, the greater number of which, on examination, are not found on the land list. The fact of these being polled for the sitting member, rests entirely on the declaration of the petitioner, who alleges that their names are on the list of the polls taken for the sitting member, a certified copy of which he was unable to procure from the proper office, but which list the sitting member declares to be incorrect.

Poll of Accomac county.

It is alleged by both the sitting member and the petitioner, that at, and subsequent to the time of the election, the usual intercourse between the different parts of the district was so interrupted by the enemies' cruisers, as to put it out of their power to procure the necessary papers and evidence to support their respective allegations, and the sitting member asks for reasonable time to be allowed him by the committee to take testimony, under the conviction that he would be able, by the evidence to be taken, to support his poll. And upon a view of all the circumstances of the case, the committee are unanimously of opinion that further time ought to be granted the parties to procure testimony, and they accordingly submit the following resolution:

*Resolved*, That (five) weeks be allowed to the parties to procure testimony relative to the said election, and that the Committee of Elections have power to examine witnesses, and make order for such examination in this case.

Parties allowed time to procure testimony, and the Committee of Elections to examine witnesses.

The preceding resolution being agreed to by the House, and some further testimony having been produced and submitted to the committee, they, on the 27th of July, 1813, made a second report as follows, to wit:

That no evidence has been exhibited to the committee to disprove the statement of facts made in the former report, viz. "that there was neither rain, nor the rising of the watercourses, to prevent the electors from attending on the first day of the election in the said county (of Accomac.) The legality of the election in that county must, therefore, rest on the ground that a greater number of electors attended than could be polled on said day.

Committee's second report.

1811.  
19th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections.

Quere, whether  
further time  
shall be allow-  
ed the sitting  
member to ob-  
tain testimony.

As to defensive  
testimony, see  
Varnum's case,  
*ante*, p. 112.

Of the notice  
given prior to  
the taking of  
the testimony  
by petitioner.

potent for the parties to show, by other testimony, that persons appearing on the land lists are not freeholders, and thus not entitled to vote; and, on the other hand, that persons not appearing on the land lists are freeholders and voters.

The sitting member, before such examination was gone into, asked for time to take testimony, under the conviction that, in a reasonable period, to be fixed by the committee, he would be able, by evidence to be taken, to support his challenges and his poll, and he still requests such time to be allowed him: the petitioner, on the other hand, has at all times opposed such request, on the ground that the sitting member has had sufficient time, since he was apprised that the election would be contested, to procure his testimony.

The committee are aware that some inconvenience must arise to the petitioner, if this contest is laid over for any time, but they think the right of suffrage ought not to be hazarded or destroyed on account of any individual inconvenience. If there has not been gross neglect in the sitting member, the committee conceive that it is due to the electors of the district who polled for him, and to himself, not to hurry his case to a decision, without giving them and him an opportunity to make good the election if they can do it.

It has been already stated that the petitioner gave notice of his intention to contest the election to the sitting member on the 7th of May, and this the former contends was sufficient to put the latter to the task of collecting and arranging his proofs; your committee see, however, that the proceeding was modelled on the laws and usages of Virginia, and, according to them, it is regarded as a mere incipient step; calling for no proceeding from the other party. Such a notice, on the heel of a contested election, is an index to the feelings of the person giving it, but not always the proof of a settled determination. As the period of the election recedes, and the difficulties attending a canvass become more apparent, the unsuccessful candidate sometimes abandons his notice and his scrutiny. It ought not, therefore, to be required of the person returned, for such cause alone, to wade through all the trouble, difficulty, and expense of a tedious examination, while it remains doubtful whether his opponent will proceed. It is surely in season to begin to take defensive testimony when the opposing party has commenced the investigation.

The notice given by the petitioner on the 27th of September, for the examinations on the 10th, 13th, and 23d of October, the committee have accordingly regarded as the first efficient measure towards the scrutiny, and they are satisfied that, in a district composed of six counties, and in a case where the votes challenged exceed four hundred, it was not practicable for the sitting member to take his testimony in season for the commencement of this session. A notice given by him after the 29th of September, would not have been deemed reasonable for an earlier day than the 10th of

October, nor would it have been allowed in him to call the petitioner from his own examinations, which were to continue until after the 22d of October: it is not possible to conceive that the sitting member would procure his evidence, allowing him time, before the first day of the session, to travel to the seat of Government.

1811.  
12th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections.

The committee, in addition to the facts already stated, report that it appears to them that, on the 29th day of April last, being the day of the canvass, the petitioner procured the certificates, under oath, of the sheriffs, and two of the deputy sheriffs, (who attended to compare the polls,) that if an equality of votes had appeared, they would have voted for the petitioner; which certificate was transmitted by the magistrate before whom it was attested, to the Clerk of this House, at the request of Mr. TALIAFERRO, to be retained until called for by him.

This the petitioner alleges ought to be regarded as the commencement of his testimony, and he contends that it not only advised the sitting member, that his seat would be contested, but made it necessary for him forthwith, and without further notice or act on the part of the petitioner, to proceed to his examinations. The committee, however, have nothing before them, which goes to show distinctly the object of the petitioner in procuring the certificate; nor can they, in any point of view, consider this as such a prelude to the scrutiny as to require from the sitting member that he should proceed to his canvass.

The committee, therefore, upon a view of all the circumstances of the case, are of opinion that further time ought to be granted to the sitting member to procure testimony, and they accordingly submit the following resolution:

The committee propose that further time be allowed the sitting member to procure evidence, but the House refuse time, and resolve that the petitioner is entitled to his seat.

*Resolved*, That a reasonable time be allowed John P. Hungerford, a member of this House, to procure testimony relative to his election, and that the Committee of Elections have power to examine witnesses, and to make order for such examinations in the case of the said election.

This report was committed to the Committee of the Whole House, and, after a consideration of two days, leave to sit again was refused.

On a motion in the House to concur with the Committee of Elections in their closing resolution, it was, by a vote of 46 to 65, determined in the negative, and a motion to recommit the subject to the same committee was also lost.

The two following resolutions being then proposed, to wit:

1. "*Resolved*, That John P. Hungerford is *not* entitled to a seat in this House.

2. "*Resolved*, That John Taliaferro is entitled to a seat in this House."

The first was carried by a vote of 67 to 29, and the second by a vote of 66 to 19.

And thereupon John Taliaferro took his seat, &c.

# THIRTEENTH CONGRESS—FIRST SESSION.

## COMMITTEE OF ELECTIONS.

Mr. FISK, of Vt.  
BURNWELL,  
DAVENPORT,  
ANDERSON,

Mr. CONDUCT,  
AVERY,  
PICKERING.

## CASE XXXII.

### JOHN TALIAFERRO vs. JOHN P. HUNGERFORD, 2d contest.

[In the opinion of the committee, the law of Virginia directing that the names of the voters shall be entered by the poll-keepers *duly* in distinct columns, is not satisfied by the insertion of the surname only, or by the prefix of the initial letter of the Christian name with it, but the whole name should appear. This opinion was overruled by the House. The land lists are not conclusive tests of the qualifications of voters : parties may resort to evidence *aliunde* to sustain their challenges.]

At the first session of the thirteenth Congress, John Taliaferro, of Virginia, again contested the return of John P. Hungerford, as a member from that State, he having been a second time chosen; and, on the 10th of June, 1818, the Committee of Elections made the following report, to wit:

Report of committee.

That, at the last congressional election in that State for Representatives, the said John P. Hungerford was returned as elected from the district composed of the counties of Westmoreland, Richmond, Lancaster, Northumberland, King George, and Stafford. The petitioner was also a candidate. The laws of Virginia prescribing the manner of conducting such elections, direct that "the clerks of the polls shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person. They further direct that "the clerks of the polls having first signed the same, and made oath to the truth thereof, a certificate of which oath, under the hand of the magistrate of the county, shall be subjoined to each poll, shall deliver the same to the sheriff," &c.

Upon inspecting the polls of the several counties, the following facts appear:

Facts of the case. Irregularities attending the election stated.

In Westmoreland the names of the voters are all entered in one general column on the left hand margin of the book, and figures in numerical order, instead of the names of the voters, are inserted in the columns under the names of the candidates, as evidence for whom each vote is given.

In Richmond the votes are registered in one column, and a straight mark, instead of the name of the voter, is in-

serted under the name of the candidate. In Stafford the Christian name of the candidate is not written on the poll; the initial letter only is given. The same occurs partially in Lancaster.

1813.  
13th CONGRESS,  
1st Session.

Report of the  
committee.

On the polls of Westmoreland, Richmond, Lancaster, and Stafford, no certificate is found of any oath having been administered to the clerks keeping the same.

The petitioner contends that the irregularities and deviations from the express provisions of the law, are of such a nature as to render void the election, and require a new one to be held.

Irregularities in  
the election  
complained of.

On the other hand, it is argued by the sitting member that most of the proceedings objected to are justified by general practice; and that the manner of keeping the poll, by entering the names of all the voters in one general column, is sanctioned by long usage; and that in Stafford the initial only of the Christian name of the electors had been entered on the polls for several past elections.

The committee are sensible that trivial errors, committed by the officers conducting elections, resulting, perhaps, from a misconstruction of a doubtful passage of a law, ought not to deprive any class of citizens of representation. Still it must be manifest that, to preserve the elective franchise pure and unimpaired, the positive commands and requirements of the law, in respect to the time, place, and manner of holding elections, ought to be observed.

To enter the names of the voters promiscuously in one margin of the poll book, when the law positively directs them to be "entered in distinct columns," and "under the name of the candidate voted for," is as manifest a departure from the law as the selection of another time, or another place, than that mentioned in the law. Nor can the committee conceive that the prefixing the initial only of the Christian name to that of the family or surname of the voter, is a fair compliance with the spirit and intent of the law, which declares "that the names of the voters shall be *duly* entered in distinct columns," &c. It is presumed that the object of the law, in having the name *duly* entered, is to exhibit to the country, on a scrutiny, who are the persons voting, and to test their title to a vote, by comparing the poll with the land roll.

Opinion of the  
committee up-  
on the irregu-  
larities com-  
plained of.

And, when, for example, the initial letter is "J," it must be obvious that it may be taken to stand for John, or Joseph, or Jonathan, or Isaac, or Joshua, and it would require no small share of perseverance and industry to contest an election where such endless uncertainty stands in the way of examination.

The committee have not been satisfied that such irregularities have ever been sanctioned, on a scrutiny, either by the Legislature of Virginia, or of the United States. When opposing candidates have not objected to them, they may

In the view of  
the committee  
the irregulari-  
ties were such  
as to vitiate the  
election.



1813.  
13th CONGRESS,  
1st Session.

## CASE XXXIV.

WILLIAM KELLY vs. THOMAS K. HARRIS, of Tennessee.

[The law of Tennessee, among other qualifications for voters, declares that every freeman, &c. "possessing a freehold in the county wherein he may vote, and being an inhabitant of this State, and every freeman being an inhabitant of any one county in the State six months immediately preceding the day of election," &c., may vote. Held to restrict the voter to vote in the county wherein he has been an inhabitant, &c. and nowhere else.]

MAY 31, 1813.

Mr. Kelly presented his petition, which was referred to the Committee of Elections; and on the 31st May, 1813, the committee reported,

Report of committee.

That, at the last general election in Tennessee for Representatives to Congress, the said William Kelly and Thomas K. Harris were candidates in the third congressional district. From a return of the polls in the district, as made to the Governor of the State, it appears that the sitting member obtained one vote more than the petitioner, and, therefore, was returned as elected.

By the laws of the State, it is made the duty of the inspectors of the election for Representatives to Congress, to cause two fair statements to be made of the number of votes given at said election for each candidate, and certify the same; and it is also made the duty of the sheriff, or returning officer, to transmit one of the said returns, or certificates, to the Governor, and to file the other with the clerk of the county court of his county. That, on comparing the certificate with the polls taken in the county of Warren, in said district, and transmitted to the Governor, with the one filed with the clerk of the said county, there appears to be *two* more votes for the sitting member, on the former, than there is on the latter certificate. And it further appears, by the first certificate, that the number of votes given to each candidate, being added together, will exceed by two the whole number of votes certified to have been given. The petitioner contends that these facts prove the certificate filed with the clerk correct, and the petitioner entitled to his seat.

The sitting member prays further time to obtain testimony.

The sitting member was not notified that his election would be contested until after his arrival in this city, and he now states that he believes that if time was allowed him, he could procure testimony to support his election, and to show that the petitioner received many illegal votes, and that there were several erroneous returns made in favor of the peti-

tioner. And the sitting member asks for reasonable time to be allowed him to obtain such testimony.

1813.  
13th CONGRESS,  
1st Session.

Upon a full view of all the circumstances of this case, the committee are of opinion that further time ought to be granted to the sitting member to procure testimony, and they accordingly submit the following resolution :

*Resolved*, That until the — be allowed to Thomas K. Harris, a member of this House, to procure testimony relative to his election.

On a subsequent day, the resolution being so amended as to allow three months to the sitting member, it was passed by a vote of 101 to 54.

#### DECEMBER 22.

Mr. SHIPHERD, of New York, offered for consideration the following resolution :

*Resolved*, That the Committee of Elections be instructed to inquire whether Thomas K. Harris, a sitting member, is, or is not, entitled to a seat in this House."

Some conversation took place between Messrs. GRUNDY, FISK, SHIPHERD, RHEA, PICKERING, and PRYKIN, on the subject of this motion ; in the course of which, it appeared that Mr. Kelly had declined reappearing to contest the election. It seemed to be conceded on all hands that the inquiry into the alleged illegality should not therefore abate ; the only difference of opinion was as to the mode of bringing the subject before the House. The conversation issued in the withdrawal of the present motion by the mover ; and,

A petition not to abate by the failure of the petitioner to appear and prosecute it.

On motion of Mr. RHEA, of Tennessee, the report of the Committee of Elections, at the last session, on the petition of Mr. Kelly, was recommitted to the Committee of Elections, with such new evidence as should be offered them, for further consideration. [See Nat. Int. of 23d Dec. 1813.]

On the 3d of January, 1814, being at the second session of the thirteenth Congress, a further report was made on the subject by the committee, as follows :

That a correct statement of the poll, and the law of Tennessee governing the said election, will be found in the report of the Committee of Elections, made in this case at the last session of Congress ; from which, it appears that the inspectors of the election in the county of Warren returned two more votes for Mr. Harris than were given for him, which gave to him a majority of one vote over Mr. Kelly ; that, deducting these two votes from Mr. Harris's poll, leaves Mr. Kelly a majority of one. Mr. Harris now produces evidence, which raises a strong presumption that the deputy sheriff who conducted the election in the county of Rhea, in said district, improperly added three or more votes to Mr. Kelly, and destroyed a like number given to a Mr. Rodgers, who was also a candidate ; and to show that Pleasant Bean and Daniel

Committee's second report.

Substance of the evidence produced.

1813.  
13th Congress,  
1st Session.

Committee's  
second report.

Obarr, who voted for Mr. Kelly, were not entitled to vote. A decision on the charge against the deputy sheriff not being likely to affect the result of the election, the committee pass it with no other remark than that the evidence leaves a strong impression that he conducted very imprudently. The affidavits of Bean and his father prove that the son was but eighteen years of age at the time of the election, and therefore not entitled to vote. By the testimony of Obarr, he had not a freehold in the district, nor had he been living more than three months in the same at the time of the election. By the third article of the constitution of Tennessee, it is provided that "every freeman of the age of twenty-one years and upwards, possessing a freehold in the county wherein he may vote, and being an inhabitant of this State; and every freeman being an inhabitant of any one county in the State six months immediately preceding the election, shall be entitled to vote for members of the General Assembly for the county in which he shall reside."

The committee are of opinion that that branch of this article, which prescribes the second qualification of the voter, restricts him to vote in the county wherein he has been an inhabitant six months immediately preceding the day of election, and permits him to vote nowhere else; and, therefore, Daniel Obarr had not a right to vote in this election. That, deducting from the poll of Mr. Kelly the two votes given by Bean and Obarr, leaves Mr. Harris a majority of one, and entitles him to a seat in this House. The committee, therefore, respectfully submit the following resolution:

"*Resolved*, That William Kelly has not supported his petition, and that Thomas K. Harris is entitled to his seat in this House."

Sitting member  
confirmed in  
his seat.

On the 10th of March, 1814, this resolution was concurred in by the House, and the election of Mr. Harris thereby confirmed.

1813.  
15th Congress,  
1st Session.

## CASE XXXV.

ISAAC WILLIAMS, JR., vs. JOHN M. BOWERS, of New York.

[A candidate is not to be prejudiced by the omission of the returning officers to add the word "junior" to his name, where the votes have been properly given by such addition.]

JUNE 23, 1813.

The following resolutions were submitted by Mr. FISK, of New York :

*Resolved*, That the Committee of Elections be instructed to inquire whether John M. Bowers, returned as a member from the State of New York, is entitled to a seat in this House.

*Resolved*, That the same committee be instructed to inquire whether Isaac Williams, junior, is not entitled to a seat in this House, instead of the said John M. Bowers.

A motion was made by Mr. GROSVENOR to postpone the said resolutions until to-morrow; which being decided in the negative, Mr. G. moved to amend the first resolution by inserting the names of Ebenezer Sage and John Lefferts after the name of J. M. Bowers.

The said resolutions, on motion, were laid on the table.

JUNE 24.

A motion was made by Mr. STOCKTON to postpone the said resolutions indefinitely; which being decided in the negative, and the motion of Mr. GROSVENOR being also rejected, Mr. BENSON moved to amend the resolutions by adding thereto these words: "and that the committee be instructed not to admit any person to appear before them as entitled to question the said election, other than the said Isaac Williams, junior, either in person, or by his agent lawfully appointed for the purpose;" and the question being taken, it was determined in the negative.

The first resolution was then agreed to.

The second resolution having been modified to read as follows: "*Resolved*, that the same committee be instructed to inquire what person, if any, is entitled to a seat in this House, instead of the said John M. Bowers," was also agreed to by the House.

On the 2d of July, 1813, the committee reported—

That, by a return of the votes from the fifteenth district in said State, it appears that

John M. Bowers had . . . . .	4,287
Isaac Williams, junior . . . . .	4,129
Isaac Williams . . . . .	434
John M. Bowey . . . . .	1
Several other persons, in all . . . . .	17

1813.  
13th Congress,  
1st Session.

Report of the  
Committee of  
Elections.

From this statement, it results that John M. Bowers had a majority of 158 votes over Isaac Williams, junior.

By the affidavit of Luther Bissell, and the statement of the sitting member, it appears that there are three persons of the name of Isaac Williams, residing within the district, one of whom is designated by the addition of *junior*, and it is candidly admitted by Mr. Bowers, that Isaac Williams, junior, and John M. Bowers, were the only candidates at this election, within his knowledge. It appears probable to the committee that the votes given to John Bowers and John M. Bowey were all intended for John M. Bowers; and that those given for Isaac Williams were intended for Isaac Williams, junior; which opinion seems to be strengthened by the fact that, in four towns in said district, nearly one hundred votes were given in each for Isaac Williams, and not one for Isaac Williams, junior. If this be admitted,

Isaac Williams, junior, will have	4,563
John M. Bowers	4,358

Leaving to Isaac Williams, junior, a majority of 205.

But the committee are of opinion that further evidence is necessary, to form a correct decision; and, in order to afford time to procure the same, they respectfully submit the following resolution:

*Resolved*, That the further consideration of this subject be postponed to the first Wednesday of the next session of Congress."

At the second session of the thirteenth Congress, to wit, on the 16th December, 1813, the committee made a second report, as follows:

Second report.

The mistakes  
of the inspec-  
tors in their re-  
turn, to be cor-  
rected.

That in addition to the facts and evidence stated in the report of the Committee of Elections, made at the last session of Congress, it appears that, from the towns of Exeter, Milford, and Westford, 322 votes were, through the mistake of the inspectors of elections in those towns, returned for Isaac Williams; which votes, according to the testimony of said inspectors, were given to, and ought to have been returned for, Isaac Williams, junior; that adding these votes to the poll of Isaac Williams, junior, gives him a majority of 164 votes over Mr. Bowers, and entitles him to a seat in this House. The committee, therefore, respectfully submit the following resolutions:

*Resolved*, That John M. Bowers is not entitled to a seat in this House.

Petitioner en-  
titled to his  
seat.

*Resolved*, That Isaac Williams, junior, is entitled to a seat in this House."

These resolutions were, by a *unanimous* vote of the House, adopted, and Mr. Williams appeared, and took his seat.

1813.  
13th Congress;  
1st Session.

## CASE XXXVI.

**BLYDENBURG and JAY vs. SAGE and LEFFERTS, of New York.**

On the 7th of July, 1813, a petition from Benjamin B. Blydenburg and Peter A. Jay was presented to the House, complaining of the undue election of Ebenezer Sage and John Lefferts, of the State of New York; which being referred to the committee, they reported, on the 13th July, that further time would be necessary to enable them to come to a just decision, and on their suggestion it was *resolved* that the case be postponed to the next session of Congress. It does not appear that any further action ever took place on the subject.

## FOURTEENTH CONGRESS—FIRST SESSION.

## COMMITTEE OF ELECTIONS.

Mr. TAYLOR, of N. Y.  
PIPER,  
SHARPE,  
PICKERING,

Mr. VOSK,  
BARBOUR,  
LAW,

## CASE XXXVII.

**WESTEL WILLOUGHBY vs. Wm. S. SMITH, of New York.**

[The errors and omissions of inspectors and returning officers are to be corrected, so as to do substantial justice to the parties. The omission in this case was, of the word "junior;" but it was held upon the proof given, not to vitiate the votes.]

The petition of W. Willoughby was referred to the Committee of Elections; and, on the 11th of December, 1815, the committee made report:

That the seventeenth congressional district of the State of New York is composed of the counties of Madison and Herkimer; that the whole number of votes given in the said district at the last congressional election was 5,292; of which 2,510 were returned as having been given for William S. Smith; 2,466 for Westel Willoughby, junior; 309 for Westel Willoughby, and 7 scattering votes. On the 23d day of February last, Westel Willoughby, junior, caused notice in writing to be given to William S. Smith, of his intention to claim his seat in the present Congress as a Representative duly elected in the said district, and appoint-

Report of the  
Committee of  
Elections.



1815.  
14th Congress,  
1st Session.

Report of the  
Committee of  
Elections.

ing a time and place for taking testimony relative thereto. From the affidavits of Thomas Paine, Flavel Clark, and George Fox, inspectors of the said election in the town of German Flats, in the said county of Herkimer; and of Matthew Keith, Benjamin Wood, Stephen Dow, and James Smith, inspectors of the said election in the town of Litchfield, in the same county, taken pursuant to said notice, it appears that, in the said towns of German Flats and Litchfield, 299 votes were, through the mistake of the said inspectors, returned for Westel Willoughby, which, in truth and fact, were given for Westel Willoughby, *junior*, and ought to have been so returned; and that in the said towns no votes were given at the said election for Westel Willoughby, without having the word *junior* added thereto.

The 299 votes above mentioned, added to the poll of Westel Willoughby, *junior*, give him a majority of 255 votes over William S. Smith.

The committee, therefore, respectfully submit the following resolutions:

"*Resolved*, That William S. Smith is not entitled to a seat in this House."

Petitioner ad-  
mitted to his  
seat.

"*Resolved*, That Westel Willoughby, *junior*, is entitled to a seat in this House."

The said report and resolutions were referred to the Committee of the Whole House, and reported without amendment; and, on the 15th, were concurred in by the House.

Whereupon, the said W. Willoughby appeared, and took his seat.

1815.  
14th Congress,  
1st Session.

## CASE XXXVIII.

## ROBERT PORTERFIELD vs. WILLIAM MCCOY, of Virginia.

[Evidence in this case was objected to, because not taken within the time limited for that purpose, in contested elections in the Virginia Legislature; but the objection was overruled.

It is not essential that the clerks of the election should be sworn *before* the poll; it is sufficient if they make oath to the truth of their return *after*.

The poll was excepted to because the names of the voters were not written under the names of the candidates, in separate columns, but the exception was not sustained.

The votes of freeholders residing out of the district, but having competent estate and possessions within it, are legal.

Votes not given in the county where the land lies, upon which they are respectively given, are to be rejected.

Votes given by virtue of title bonds, not conveying a legal freehold estate, are to be rejected.

All votes recorded upon the poll lists, should be presumed good unless impeached by evidence.

Certified copies of the commissioner's books, or land lists, are *prima facie* evidence of the qualification of voters whose names appear on them.

The affidavit of a voter, taken before competent authority, in pursuance of regular and sufficient notice, may be read in evidence to prove his title to vote.]

DECEMBER 12, 1815.

The petition of Robert Porterfield was presented, and referred to the Committee of Elections.

On the 19th of February, 1816, the committee made the following report:

That, at the last election in Virginia, the petitioner and sitting member were opposing candidates in the congressional district composed of the counties of Augusta, Rockingham, Pendleton, and Bath. The whole number of votes given in the district were 2,378, of which 1,213 were returned for the sitting member, and 1,165 for the petitioner. One of the votes given for the sitting member was, by mistake, set down and returned for the petitioner; and three votes offered to be given for the sitting member were improperly rejected by the sheriff, and have been added to his poll by the committee. From these facts, it appears that the sitting member's majority amounts to fifty-three votes. But of the votes given at the said election, 745 were objected against as illegal; of which 390 were given for the petitioner, and 355 for the sitting member. The committee have carefully investigated the titles upon which the said votes

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Elections.

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Elections.

were given, and find that there are upon the polls of the petitioner 171, and of the sitting member 149 illegal votes. The difference between these numbers being added to the 53 votes above mentioned, gives to the sitting member a majority of 75 over the petitioner. The election in the said district commenced in the county of Pendleton on the 4th, and closed in the county of Augusta on the 24th day of April last. On the next day the petitioner caused a notice, in writing, to be served on the sitting member, communicating the intention of contesting his election. On the 22d day of May the petitioner served on the sitting member a list of votes, to the legality of which he objected; on the 9th of June the sitting member served a similar list on the petitioner, and invited him to a speedy commencement of the investigation. On the 22d of August the petitioner notified the sitting member of his intention to commence the investigation on the 4th of September then next, at the courthouse in the county of Augusta, and to proceed with as little delay as circumstances would admit to the other counties in the district. On the last mentioned day the sitting member caused to be delivered to the petitioner a protest, in writing, against the legality of his proceedings, and declined attending accordingly. The petitioner proceeded to take testimony in support of his votes, pursuant to the notice. Upon these facts the sitting member contended that the committee ought not to receive the testimony so taken, 1st. Because it had not been taken within the period limited for that purpose in contested elections for members of the General Assembly of the commonwealth of Virginia; and 2d. Because the delay of the petitioner in commencing the investigation for more than four months, was unreasonable, and ought not to be allowed.

The committee overruled these objections, and admitted the evidence.

Upon proceeding to a scrutiny of the votes in the county of Rockingham, the petitioner contended that the whole poll ought to be rejected,

Petitioner's exceptions to the right of the sitting member.

1st. Because the election commenced in his absence.

2d. Because the four clerks or writers appointed by the sheriff to keep the poll were not sworn previous to the commencement of the voting, "*that they would take the poll fairly and impartially;*" but on the next day after the election examined and subscribed the poll, and made affidavit thereon "*that the same did contain a just and true account of all the votes taken at the said election, to the best of their knowledge and belief.*"\*

3d. Because the names of the voters were not written under the names of the candidates in separate columns, but in the same column, and the votes carried forward and

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\* See the case of Draper vs. Johnson, determined at the first session of the twenty-second Congress.

marked under the names of the candidates for whom they respectively voted; and

4th. Because great noise and confusion prevailed at the election, without any effectual attempt by the sheriff to prevent it.

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14th CONGRESS,  
1st Session.  
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Elections.

The first and fourth of these objections were not supported by evidence; the second and third were overruled by the committee. In regard to the second objection, it was proved by the affidavit of two of the clerks who kept the poll, "that although they were not sworn before the voting commenced, yet they conducted their poll-book under the impression that they would be sworn after the polls were closed, and that this had been the most usual custom in the county of Rockingham." In regard to the third objection, it not only was proved that it had been usual to keep the poll in that manner in the county of Rockingham, but the poll in the county of Pendleton, where the election commenced, and in which the petitioner had a majority of the votes, was kept in the same manner, and was not impeached by either party. The errors specified in these objections, in the judgment of the committee, relate more to form than substance. It was not alleged or pretended that the final result had been in anywise varied in consequence of a deviation in these particulars from the letter of the law regulating elections.

In the course of the investigation, the sitting member applied to the committee for permission to avail himself of an agreement entered into between him and the petitioner at the election in the county of Pendleton, to the following effect: That votes should be admitted on title bonds for a sufficient quantity of land, accompanied with a possession of six months; that persons having a right to vote in one county, but *happening* to be at an election in another county of the same district, might vote in such other county, and that votes of persons residing out of the district should not be admitted. The petitioner admitted such agreement to have been made, but contended that he was absolved from its obligation, because the sitting member had admitted the votes of two or more persons not residing within the limits of the congressional district to be entered on his poll and counted among his votes. This allegation was denied by the sitting member.

The committee being of opinion that the agreement of the parties could not either diminish or enlarge the elective franchise as secured to the freeholders of the district, by the laws of the commonwealth, decided,

1st. That the votes of the freeholders residing out of the district, but having competent estate and possessions within it, be held legal. Points decided by them.

2d. That all votes not given in the county where the land upon which they were respectively given, was situate, be rejected; and

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Committee of  
Elections.

3d. That all votes given by virtue of title bonds, not conveying a legal freehold estate, be rejected.

The committee further decided,

1st. That all votes recorded on the poll lists should be presumed good unless impeached by evidence.

2d. That certified copies of the commissioner's books or land lists should be read in evidence, and deemed satisfactory as to the qualification or disqualification of voters, unless corrected by other evidence;\* and

3d. That the affidavit of a voter taken before competent authority, in pursuance of regular and sufficient notice, should be read in evidence to prove his title to vote.

The committee deem it proper to report to the House these decisions, by which it has been regulated in conducting the investigation, and respectfully submit the following resolution:

Sitting member  
entitled to his  
seat.

*Resolved*, That William McCoy is entitled to a seat in this House."

The report was read, and referred to a Committee of the Whole House, who reported the resolution contained therein, without amendment; and,

On the 19th of April, 1816, the question was then taken in the House to concur with the Committee of the Whole in the said resolution; and it passed in the affirmative without a division. So Mr. McCoy was confirmed in his seat.

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\* In England, on the trial of contested elections, the poll-book is admitted in evidence. [See 1st Peckwell on Contested Elections, p. 208, and 2d Peckwell, p. 270.]

1815.  
14th CONGRESS,  
1st Session.

## CASE XXXIX.

ERASTUS ROOT vs. JOHN ADAMS, of New York.

[By the palpable mistake of the clerk of the county, in the return of the votes to the Secretary of State of New York, the petitioner had been deprived of a large number of votes, which were really given for him. On the proof of this error he was admitted to his seat.]

The report of the Committee of Elections in this case, made to the House on the 26th of December, 1815, sets forth :

That the eighth congressional district in the State of New York is composed of the counties of Delaware and Greene ; that 4,182 votes were given in the said district at the last congressional election, of which 2,214 were given, and by the inspectors returned to the offices of the clerks of the said counties, for Erastus Root, and 1,968 were given, and returned as aforesaid, for John Adams. From the certificate of James Bill, late clerk of the said county of Greene, certified on oath, and admitted to be correct by the said John Adams, it appears that an error was committed in the office of the said James Bill, by his deputy clerk, in making transcripts of the returns from the towns of Catskill, New Baltimore, Coxsackie, Durham, and Greenville, in the county of Greene, for the office of the Secretary of State, by writing the name of Root *Rott*, instead of *Root* ; when, in truth and fact, in the original returns on file in the office of the said clerk, the said name was written Root ; 576 votes were, in those towns, given to and returned for Erastus Root, and ought to have been so certified by the clerk to the Secretary of State. These votes, added to the poll of Erastus Root, give him a majority of 246 votes over John Adams.

Report of committee.

Mistake of the petitioner in the State returns, allowed to be corrected.

The committee, therefore, respectfully submit the following resolutions :

“ *Resolved*, That John Adams is not entitled to a seat in this House.

“ *Resolved*, That Erastus Root is entitled to a seat in this House.”

Both resolutions appear to have passed without opposition, and Mr. Root was qualified, and took his seat.

Petitioner admitted to his seat.



## FOURTEENTH CONGRESS—SECOND SESSION.

### COMMITTEE OF ELECTIONS.

MR. TAYLOR, N. Y.  
PICKERING, Mr.  
KEHR, Va.  
HALM, Pa.

MR. VOSK, N. H.  
LAW, Con.  
THOMAS, Ten.

### CASE XL.

#### RUFUS EASTON vs. JOHN SCOTT, *Delegate of Missouri Territory.*

[Where votes are given by *ballot*, an elector cannot be compelled to disclose the name of the candidate for whom he voted; in such cases the qualifications of a voter must be determined by the judges of the election, and their decision upon the point is final.\*

If votes are required by law to be given by ballot, *viva voce* votes ought not to be received.

If an election is required by law to be held by *three* judges, who are to be sworn, and it is held by *two* not sworn, their proceedings are irregular, and the votes taken by them are to be rejected.

Under the law of Missouri, it is no objection to the proceedings, that the same magistrates acted as judges of the election, and, also, as assistants to the clerk in making his returns.

A law requiring the votes to be set down in *writing*, is sufficiently complied with, by setting them down in *figures*; though the compliance with the law be not literal, yet the variance relates only to form; no ambiguity is produced thereby, and no injury is done to either party.

When the clerks of an election are required to be sworn, it is not essential that the certificate of the oath taken by them should be entered on the poll-book.

If voters are objected to on account of the want of legal qualifications, the party excepting to them should, before taking testimony, give notice to his adversary, of the *particular* qualifications in which they are deficient; a general averment in the notice, that the votes are illegal, is not sufficient; and the names of the persons excepted to must also be stated.]

On the 31st December, 1816, the Committee of Elections, to which was referred the petition of Rufus Easton, contesting the election of John Scott, reported:

Report of the  
Committee of  
Elections.

That, at the last election in said Territory, the petitioner and the said John Scott were opposing candidates. The whole number of votes counted, cast up, and arranged by William Clarke, Governor of the Territory, as having been given at the said election for Delegate to Congress, and

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\* The intention of a voter is to be ascertained only from the box in which his ticket is deposited. See Washburn vs. Ripley, *post*.

upon which his certificate was founded, was 3,647, of which, 1,816 were given for John Scott, and 1,801 for the petitioner, and 30 for other persons.

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2d Session.

The petitioner stated the following objections, in writing, to the election and return of John Scott as Delegate from said Territory :

Report of the  
Committee of  
Elections.

“ 1st. That, according to all the votes given at the election on the first Monday in August, 1816, counting those legally returned, and such as were not returned within the time prescribed by law, or were rejected, he has a majority of fifteen votes over his opponent, John Scott. To prove which, he refers the honorable Committee of Elections to the abstract of votes returned to the Governor, according to the act to regulate elections in that Territory, being document marked B, and to the depositions of S. A. M. Carter, Andrew Kinkaid, Clement B. Penrose, and John Cunningham.

Petitioner's  
allegations  
against the sit-  
ting Delegate.

“ 2d. That, according to the abstract of votes legally and illegally made to the Governor, the said Rufus Easton has a majority of seven votes over the said John Scott, considering the copy of the paper from Cote Sans Dessein, in the county of St. Charles, certified by the clerk of that county to be a copy on the 18th September, 1816, more than a month after the abstract of votes from that county had been filed in the Executive office, not to be an abstract of votes, but a nullity, as it certainly is ; to prove which, the honorable Committee of Elections are referred to the seventh section of the act of the Territory, entitled ‘ An act to regulate elections,’ which provides ‘ that, previous to any votes being received, the judges and clerks shall severally take an oath or affirmation,’ in the form therein prescribed. The deposition of Isaac Best, one of the persons who pretended to act as judge, proves that ‘ one Baptiste Roy was the only person who acted with him as judge, and that a person of the name of Frereault acted as clerk, and no other ; and that neither of the judges or clerk were sworn.’ The act requires that there should be three judges and two clerks to hold an election ; ‘ that the poll shall be opened at eight o'clock in the forenoon, and close at six in the afternoon ; that the persons who shall administer the oaths shall cause an entry thereof to be prefixed to the poll-books in words to the following effect: I do hereby certify that ——— judges and ——— clerks of the election, held in the township of ———, in the county of ———, on the ——— day of ———, in the year one thousand eight hundred and ———, were severally sworn as the law directs, previously to entering on the duties of their office ; which certificate shall be subscribed by the person administering the said oaths or affirmations, and be considered as a part of the record of the said elections.’ The act further requires that each clerk shall furnish himself a poll-book of the election ; and, at

1816.  
14th CONGRESS,  
2d Session.

Objections stated by the petitioner.

the close of the polls, the names of the electors contained upon the poll-book shall be counted and set down, in writing, at the foot of the column in which they are entered, and the number of votes cast up and arranged, and set down, in writing, at the foot of the poll-book, and shall be signed by the judges, and countersigned by the clerks, &c. And further, that the electors shall vote *by ballot*. [See sections 4, 5, 6, 7, 8, 9, 10, and 13, of the act to regulate elections.] None of these requisites were complied with at *Cote Sans Dessein*; which is not only proven by the return of the persons pretending to hold an election there, but by the deposition of Joseph Roy, that 'two persons acted as judges, and another person did the writing; that the polls were opened at 11 A. M. and closed at 2 P. M.; that one Charles Belle refused to vote for any person, but was forced to do so by the judges, who sent a paper to bring him before them.' The depositions of Francois Denoyer and Joseph Morin prove that the judges put on the list the names of persons as voting for Mr. Scott, who did not vote, and who were not in the township on the day of the election: and the depositions of Peter Powell and Asa Williams prove 'that George Evans, alias Avans, and Jesse Avans, whose names appear on the list as voting for Mr. Scott, had not been in the Territory eight months prior to the day of election; and that the votes were given by word of mouth.' The act of Congress requires a residence of one year. By the deposition of Baptiste Pineau, it appears he was out hunting on the day of election, and yet his own, or son's name, who is about 17 or 18 years old, is listed as voting for Mr. Scott. Joseph Morin's deposition proves that he was absent on the day of election, that his name was listed as voting for Mr. Scott, without his consent or approbation; and that the name of Joseph Rivard,  *fils*, (junior,) who is only 18 or 19 years of age, is listed as voting for Mr. Scott.

Provisions of the election law of Missouri.

"Notwithstanding all the defects apparent upon the face of the paper relating to the election at *Cote Sans Dessein*, and although the same had been rejected by a majority of the justices and clerk of the court, authorized by the fifteenth section of the beforementioned act regulating elections, 'to make the abstract of votes for Delegate to Congress, which, being signed by the judges, or justices, and clerk, or any two of them, shall be deposited in the clerk's office, and a copy thereof, certified under the official seal of such clerk, shall be transmitted, by express, to the Governor of the Territory. And it shall be the duty of the Governor, within thirty days after the expiration of the time allowed for making county returns, to cast up and arrange the votes from the several counties, or such of them as may have made returns, for each person voted for as Delegate to Congress, and shall immediately thereafter issue his proclamation, declaring the person having the highest number of votes to be elected

as Delegate to represent the Territory in the House of Representatives of the United States, and to grant a certificate thereof, under the seal of the Territory, to the person so elected :’ and although the abstract of votes for Delegate to Congress, from the county of St. Charles, had been made and sent to the Governor on the 17th day of August, 1816, after all the returns which had been made from the other counties, it appeared, according to those abstracts, that Rufus Easton had a majority of seven votes ; the Governor, nevertheless, refused him a certificate of his election, although, according to law and common justice, he was entitled to it. The said John Scott, taking with him a certain George Ferguson and James Brady, proceeded to the county of St. Charles, and there requested of the clerk a copy of the election return of Cote Sans Dessein. The clerk made out a copy of the paper to be found in the third page of document B, and described under ‘note.’ ‘The following return was received at the Executive office (delivered by James Brady) on the 18th September,’ 1816 ; and the said John Scott requested the clerk to fold it, and direct it to the Governor of the Territory : and the clerk directed it to ‘His Excellency William Clark, Esq., St. Louis.’ For which copy the clerk was paid by the said John Scott, or his order, and the copy was taken, in the night, from the clerk’s office, by the said Ferguson, or Brady ; all of which facts appear by the deposition of William Christy, jun., Esq., clerk : on which paper there appears the name of Rufus Easton, with one other name under it, and the name of John Scott, with twenty-three other names under it ; which paper was not and is not an abstract of votes, and the Governor had no power, legal authority, or right to make use of it as such.

“ 3d. That according to the abstract of votes certified agreeably to law, and returned to the Governor of the Territory of Missouri, according to the statute in that case provided, the said Rufus Easton has a majority of *fifty-one* votes over his opponent, John Scott, which appears from a copy of the said abstracts contained in document marked B ; that in the county of Lawrence the clerk has made the abstract of votes from that county himself, sent the original to the Governor, and not a copy, which he had no authority to do ; and that no abstract of votes having been made, signed by the judges or justices, and clerk, or any two of them, deposited in the clerk’s office, and a copy thereof, certified under the official seal of the clerk, the Governor had no authority under the law to count the votes given in that county.

“ The above objections are submitted to the honorable Committee of Elections by Rufus Easton, to show that he has been arbitrarily and erroneously deprived of a right secured to him by law, in the granting of a certificate of election by the Governor of the Territory of Missouri to John Scott, as the Delegate of that Territory.

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14th CONGRESS,  
2d Session.

Objections stated by the petitioner.

1816.  
14th CONGRESS,  
2d Session.

"The said Rufus Easton wishes it understood by the honorable committee, that, by laying these objections before them, he will not be prevented or precluded, at any stage of the examination, from making other statements, and exhibiting other proofs and documents in support of his right.

"RUFUS EASTON.

"December 19, 1816."

Report of the  
Committee of  
Elections, con-  
tinued.

By the twenty-third section of the act to regulate elections in the said Territory, it is enacted in the following words, "that, in all elections to be held in pursuance of this act, the electors shall vote by ballot." It was intended by the Legislature to ensure to each elector the privilege of a secret vote to enable him more independently to exercise the elective franchise. The committee know of no authority competent to compel an elector to disclose the name of the candidate for whom he voted; but without such disclosure it is in vain to inquire into the qualification of an elector, with a view to purge the polls. It would become important only as it related to the conduct of the judges of the election. They are clothed with full power to examine, upon oath, and adjudge every elector presenting himself to vote, either qualified or disqualified; they may admit or reject him. They are liable to punishment if they knowingly receive an improper vote, or conduct themselves, in any respect, with partiality. The committee are of opinion that their adjudication as to the qualification or disqualification of electors under the law of the Territory should be final.

See Reed vs.  
Cuden, post.

The committee  
will not inquire  
into the qualifi-  
cations of vo-  
ters.

The committee, therefore, overruled so much of the objections of the petitioner as related to the qualifications of the electors, and decided that they would not investigate the same, nor inquire for whom they respectively voted. Of the 3,647 votes, above mentioned, there were given in the township of *Cote Sans Dessein* 23 for John Scott, and 1 for the petitioner. The votes of this township were unanimously rejected by the committee, for a variety of causes, among which are the following:

1. The election was held *viva voce*.
2. But two persons acted as judges, and neither of them were sworn.
3. But one person acted as clerk, and he was not sworn.
4. The votes were rejected by the justices whom the clerk took to his assistance in making out the abstracts to be forwarded to the Governor; they were sent to the Governor in an irregular manner; and the paper called a return appeared, upon its face, to be defective in many important particulars.

The committee having rejected these votes, there was left a majority of 7 votes in favor of the petitioner. It was then contended by the petitioner that he was entitled to the certificate of election, and ought forthwith to be admitted to

a seat instead of John Scott, for the following reasons submitted by him in writing :

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“ The fifteenth section of the ‘ Act to regulate elections’ in that Territory declares, ‘ that on or before the fifteenth day after the day of election, or sooner, in case all the returns be made, the clerk of the court of common pleas of the county, taking to his assistance two judges of the court of common pleas, or justices of the peace, or one of each, shall proceed to open the several returns which have been made to his office, and make abstracts of votes in the following manner: The abstract of votes for Delegate to Congress shall be on one sheet, and the abstract of votes for Representatives shall be on another sheet, separate from the sheet on which the abstract of votes for Delegate is contained, and being signed by the judges or justices, or any two of them, shall be deposited in the clerk’s office, and a copy thereof, certified under the official seal of such clerk, shall be transmitted by express to the Governor of the Territory, or to the person exercising the government thereof. And it shall be the duty of the Governor, or person exercising the government for the time being, within thirty days after the expiration of the time hereinbefore allowed for making county returns, to cast up and arrange the votes from the several counties, or such of them as may have made returns, for each person voted for as Delegate to Congress; and shall immediately thereafter issue his proclamation, declaring the person having the highest number of votes to be elected as Delegate to represent this Territory in the House of Representatives of the United States, and to grant a certificate thereof, under the seal of the Territory, to the person so elected.’ The duty enjoined upon the Governor is to cast up and arrange the votes from the several counties, or *such of them as may have made returns*, for each person voted for as the Delegate to Congress, and *shall immediately* thereafter issue his proclamation, declaring the person having the highest number of votes to be elected as Delegate to represent the Territory in the House of Representatives of the United States, and to grant a certificate thereof, under the seal of the Territory, to the person so elected. It is not the duty of the Governor to *cast up and arrange votes* not returned to him according to the provisions of that section of the law. The votes meant or intended to be cast up are such as are contained in the abstracts made by the justices and clerk, or any two of them, from the several returns of the election from the different townships to the clerk’s office of the county, as contained in the poll-books; which abstracts shall have been *deposited in the clerk’s office, and a copy thereof, certified under the official seal of the clerk, transmitted by express to the Governor*; he is not empowered or required to cast up votes contained in the return made to the clerk’s office, nor ought he to cast up votes contained in a paper

Ground of the  
petitioner’s  
claim to the  
seat.



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Petitioner's ar-  
gument.

*which is not an abstract* ; indeed, he has no authority to do it. It is upon a copy of the abstracts of votes *certified under* the official seal of the clerk, and transmitted by express to the Governor within the time prescribed by law, and upon that alone, that he is called to act. He cannot make abstracts of votes himself, nor ought he to receive any made by others not authorized to make abstracts ; and if he sanctions such unwarrantable acts by casting and arranging, under the law, the votes they are supposed to contain, he violates a law which ought rigidly to be carried into execution, and tramples upon the rights of the community.

“ There can be no doubt that, by the abstracts sent to the Governor, Rufus Easton had the highest number of votes. The Governor counted for Rufus Easton 1,800 votes, and for John Scott 1,793 ; besides those supposed to be contained in the paper from Cote Sans Dessein, which is rejected—it is a nullity. It was then the bounden duty of the Governor, enjoined upon him by law, sanctioned by his own signature, to have granted a certificate of election to the said Rufus Easton. This the Governor refused to do, as will appear from a notice and request served on him the 24th September last. And for this injury what is the remedy ? It is not to be found in the Territorial Government, where public opinion has scarcely any influence upon a Territorial Governor.

“ There is a maxim, founded on the principles of universal justice, that ‘ there is no wrong without a remedy, and no right but what may be enforced.’ From my own experience in life, I am inclined to believe the maxim would be much more correct and true, if it should read, ‘ *there should be no wrong* without a remedy, and no right but what *ought to be enforced.*’ And how is this wrong to be righted, and the remedy enforced, but by making the person entitled to the certificate of election the sitting member ? I have been told that it is the parliamentary practice of Great Britain, that when a person has been wrongfully returned, the person who ought to have been returned is entitled to become the sitting member, and leave it to the opposite party to contest. The distinction is a plain one. In cases where the person returned comes rightfully by the certificate of election, then he ought to keep his seat, till it is shown that he is not entitled to it ; but where the person comes wrongfully by the certificate, in such cases he is not entitled to it, it is the property of another ; the seat belongs to another, and that other ought not to be kept out of it upon a mere supposition. The parliamentary rule of practice of Great Britain would have very little weight or influence with me, should I be called upon to decide, except when founded on the immutable principles of justice. But if I am correct as to what their practice is, in this particular it is the practice of right ; and so far it ought to be regarded as a practice fit

to be adopted into a republican Government. I would listen to the rules and practice of Great Britain, and adopt them if just and reasonable, and reject whatever might be the off-spring of injustice and oppression.

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Petitioner's argument.

“The present case is, perhaps, a novel one ; a case without a parallel and without a precedent. It is not a case like that of Isaac Williams and Isaac Williams, junior, or Charles Turner and Charles Turner, junior. In these two cases the decision of the question of fact, as to the votes being given for one and the same person, decided the whole contest : and had the question there been made, Who ought to have been returned ? the result would have been the same. The question, Who ought to be the sitting member ? could not be decided without determining, in the same instant, which was entitled to the seat. And, in the case of Kelly\* and Harris, it does not appear from the record of proceedings that the point was made.

“The case under consideration is altogether of a different character. It is a *territorial case*, not likely to occur or happen under any Government where public opinion has its proper influence ; which will always correct the evil and enforce the remedy.

“The question here, Who ought to have been returned ? is a separate and distinct question, one that can be decided without determining or touching the main question. It is one which will, as nearly as can be expected, give the remedy. It is a question, if the returning officer erred, What ought the House of Representatives to do ? Will not the immediate Representatives of a free, independent, and enlightened people, whose laws, maxims, and practice are founded on the universal and unchangeable principles of justice, correct the error, and place the party in the situation he ought to have been placed under the law ? It is simply a question to be decided from the abstracts of votes returned into the Executive office according to law.”

The committee being of opinion that the application of the petitioner ought not to be granted, proceeded in the investigation. The sitting Delegate objected against the poll in the township of Maniteau, in the county of Howard, because the votes were given *viva voce*. This objection was not supported by evidence, and is not apparent from an inspection of the poll. In the township of St. Charles, in the county of St. Charles, he objected :

1. That the votes were not cast up and arranged by the judges of the election, as the law directs.
2. That the votes were not counted.
3. That the same magistrates acted as judges of the election, and as assistants to the clerk in making his return.

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\* In this case, it is probable the error in casting up the votes did not appear to the Governor, or was not to be discovered upon the face of the abstracts certified to him ; if so, Harris came rightfully by the certificate.

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The first and second objections were altogether unsupported by evidence, and the third was overruled by the committee. The election law does not prohibit judges of the election acting as assistants to the clerk in making his returns to the Governor.

In the townships of Saline and Big river, in the county of St. Genevieve, he objected against the returns. In the first, because the return appears blank, as neither the judges nor the clerk signed it; because it is otherwise informal, and because it appears to have been only a poll-book, stating, "Easton 19, Scott 14," without designating for Delegate to Congress. In Big River township, because it is not certified that the clerks were sworn; that the only evidence showing when the election was held is to be inferred from the date of the qualification of the judges. The only evidence in support of these objections was, an extra-official note or memorandum thereof, made by the clerk of the county of St. Genevieve, on the abstracts sent by him to the Governor. The committee considered this evidence altogether insufficient to establish the objections. If the facts existed, as alleged by the sitting Delegate, they might have been proved by the official copies of the poll-books, on file in the office of the clerk. He further objected against the poll in the township of St. Michael, in the same county, because it was closed at 2 instead of 6 o'clock P. M. No proof was adduced in support of this objection.

In the township of Bellevue, in the county of Washington, he objected against the poll, because the votes were given *viva voce*; and because one of the judges of the election administered the oath of office to himself. Neither of these objections were proved to the satisfaction of the committee.

In the township of Concord, in the same county, he objected against the poll, because the votes were not written or extended at length in the return of the judges of the election, but were set down informally; and because the votes were given *viva voce*. These objections were, in the opinion of the committee, altogether unsupported by the evidence.

The committee then proceeded to consider the objections made by the petitioner. In the township of *Cinq Hommes*, in the county of St. Genevieve, the petitioner objected against the poll,

1. Because William Tucker was appointed a judge of the election by Barnabas Burns, a justice of the peace, or by the other two judges, whereas, by law, it was the duty of the justice himself, *being present*, to act in that capacity.

2. Because the votes were not cast up and set down *in writing*, as the law directs, but stated in figures only.

Both these objections were overruled by the committee. As to the first, for aught that appears, Mr. Justice Burns may not have been present at the opening of the election, or,

if present, he may have refused to serve as a judge, although he had the power of acting in that capacity. Tucker having been appointed a judge by nomination, the committee presumed that, in the words of the law, "there was no person present to act as a judge."

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The second objection is satisfactorily proved: by an official copy of the original poll-book, certified by the county clerk, it appears that the return is stated in *figures* "for Rufus Easton 16—for John Scott 107." In the election law, it is enacted that "the number of votes given to each person shall be *set down in writing* at the foot of the poll-book." In this particular the words of the act were not literally complied with, but the variance relates only to form; no ambiguity is produced thereby, and, as far as the committee can discover, no injury is done to either party.

A return of  
votes in figures,  
is a return in  
writing.

In the township of Breton, in the county of Washington, the petitioner objected against the poll, because John Rice Jones, one of the judges, was appointed by the other two judges, when the place ought to have been filled by John Brickey, a justice of the peace, who was present at the election. This objection was overruled, for the reasons stated in relation to the first objection made to the poll in the township of *Cinq Hommes*.

In the township of German, in the county of Cape Girardeau, the petitioner objected to the return,

1. Because the clerks of the election were not sworn.

2. Because there is no certificate of the clerk's being sworn prefixed to the poll-book, as required by law.

The first objection was not supported by any affirmative evidence; the second was overruled by the committee. Although the certificate is not made according to the letter of the law, yet a majority of the committee being of opinion, from inspecting a certified copy of the original poll, that the clerks were in fact sworn, decided against rejecting the return.

The committee having thus disposed of the objections above mentioned, an application was made by the sitting Delegate for further time to procure copies of the poll-books, from the several townships in the counties of St. Genevieve, Cape Girardeau, New Madrid, Lawrence, and Arkansas, for the purpose of proving that the polls in the several townships in which majorities had been given for the petitioner, had been kept in an irregular manner; that the judges in the township of Tywapity had closed the polls before six o'clock, and that, in many instances, the returns were defective upon the face of them.

The election was held throughout the Territory of Missouri on the 5th day of August last. The Governor having granted to the sitting Delegate a certificate of his election, the petitioner, on the 24th of September last, served upon him a notice of his intention of contesting his election. On

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the 28th of the same month the sitting Delegate notified the petitioner of the times and places at which he proposed taking depositions to support his election, commencing on the 12th of October last, and ending on the 4th of February next. Five months have nearly elapsed since the election in the said Territory, and more than three since the sitting Delegate was notified by the petitioner that his election would be contested. The committee were of opinion that sufficient time had been allowed to procure copies of the poll-books from every township in the Territory ; and that the application of the sitting Delegate for further time ought not to be granted. Thereupon, it was contended by the sitting Delegate, that, by rejecting the votes in the township of *Cote Sans Dessein*, the candidate would become entitled to a seat who had not a majority of voices in his favor ; and, therefore, the election should be set aside, and a new one ordered. The committee did not concur in this opinion.

Upon a view of the whole premises, the committee respectfully submit the following resolutions :

“ *Resolved*, That John Scott is *not* entitled to a seat in this House as Delegate from the Territory of Missouri.

“ *Resolved*, That Rufus Easton is entitled to a seat in this House as Delegate from the said Territory.”

Debate on the  
report of the  
Committee of  
Elections.

The preceding resolutions being before a Committee of the Whole House, on the 3d of January, 1817, Mr. WEBSTER opposed the report of the committee, principally on the ground of its being predicated only on illegality, in a separate election, without entering into an examination of the qualifications of the voters generally ; and concluded by moving the recommitment of the report to the Committee of Elections, with instructions “ to receive evidence that persons voting for either candidate were not entitled to vote on the election.”

On this motion a wide debate took place, chiefly on the point, whether votes given by ballot, and, of course, privately, could be afterwards ascertained, or the voter called in, to declare for whom he had voted, when the very object of the mode was to afford secrecy and freedom to the elector ; also on the eligibility of elections by ballot, and of those *viva voce*, and on the propriety of reversing an election, without first ascertaining the legality of the votes which decided it. Besides these main questions in the debate, it embraced an inquiry into the particular circumstances of the case at issue, and many incidental points, by various speakers.

Those gentlemen who advocated the recommitment, were Messrs. RANDOLPH, WEBSTER, SHEFFEY, CALHOUN, PITKIN, THOMAS, and TELFAIR ; and those opposed to it, Messrs. TAYLOR, of New York, PICKERING, WRIGHT, and ROSS.

Mr. CADY doubted whether Delegates from the Territories could be considered as officers of the General Government ;

he looked upon them rather, as the mere agents for the Territories, allowed, by courtesy, to sit and speak in the House, without the power to vote, and that their election was not properly cognizable before the House.

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Debate, continued.

Mr. RANDOLPH expressed the same opinion, and was in favor of laying the report on the table.

Mr. GASTON, of North Carolina, contended that the House had no power judicially to decide on the qualifications or right of a Delegate to a seat in the House, since a Delegate was not a *member* of the House, according to the constitution, and there was no provision in the laws authorizing the Territories to send Delegates, which gave to this House the power of revising the legality of their election.

Mr. WEBSTER, in reply to Mr. G., asked what course the gentleman would pursue, if the returning officer should grant two certificates to different persons; a thing by no means impossible. Should both be allowed to take their seats, or would not the House examine which of the two had the correct return? From the nature of things, Mr. WEBSTER contended that it could not but be the right and duty of the House to decide in cases of contested elections of Delegates.

Mr. P. P. BARBOUR, of Virginia, took the same ground as Mr. W., which he argued at some length, and with much clearness, contending that the House either had jurisdiction, or it had not: if it had not, it had no right to look at the return, for any purposes, or at the correspondence of the return with the member who took the seat: if it had jurisdiction, it had certainly a right to examine, on any point whatever, the validity of the return; otherwise, the absurdity would follow, that any man whatever, claiming a seat as Delegate from a Territory, would have a right to take it, whether duly elected or not.

Mr. TAYLOR, of New York, defended the report, and contended that the decision on the qualifications of electors ought to be left to the judges of elections, not because the House had not the right to scrutinize the votes, but because, in most cases, it is not practicable for them to do so. He opposed the recommitment, and prayed the House to decide on the report as it stood. [See the debate in the National Intelligencer of the 4th and 7th January, 1817.]

The vote being taken on the motion to recommit, it was decided in the affirmative; and, on the 10th, the committee made a further report as follows:

Report recommitted.

The Committee of Elections, to which was recommitting their report of the 31st of December last, with instructions "to receive evidence that persons voting for either candidate were not entitled to vote in the said election," report the same to the House, with the following additional facts and statements:

Second report of the Committee of Elections.

The general notice served by the petitioner on the sitting Delegate, on the 24th of September last, is in the following



1817. words : " Sir, take notice that I shall take the depositions  
 14th CONGRESS, of witnesses before some proper authority, to be read in the  
 2d Session. House of Representatives of the United States at the next  
 2d report of the session of Congress, for the purpose of establishing my right  
 Committee of to a seat in that body, as a Delegate from the Territory of  
 Elections. Missouri."

On the next day, the petitioner served on the sitting Delegate a special notice of taking testimony in the townships of St. Charles and Cote Sans Dessein, in the county of St. Charles, and in the township of Bon Homme, in the county of St. Louis, for the purpose of proving that the judges of the election in the latter township "improperly refused to count a number of legal votes given for him;" and in the other townships "for the purpose of proving that no legal election was held; that a sufficient number of judges did not attend; that the judges were not sworn; that no clerks were appointed; that no poll-book was kept; and that no votes were legally taken." It was upon the evidence taken in pursuance of this special notice, that the committee rejected the votes from the township of Cote Sans Dessein. On the 28th of September last, the sitting Delegate served on the petitioner a general notice in the same form with that first received by him from the petitioner, concluding in the following words:

Statement of facts. "Which depositions, at each of those places and days, will be taken for the purpose of proving that the election, in each of the townships, for a Delegate to the Congress of the United States from the Territory of Missouri, was not held on the first Monday of August last past, according to law, in the following particulars, to wit: That a place in each township had not been named for holding such election agreeably to law; that the elections were not held at the places appointed for holding the same in each of the townships; that no notice of such election, and of the times and places of holding the same, had been given by the respective sheriffs; that the polls were not opened according to law in the several townships; that no judges of election had been appointed by the circuit courts; that no judges of election were chosen by the people, and none officiated or were sworn according to law; that no clerks were appointed nor sworn; no poll-books kept, and no legal votes given to you; that illegal votes were given for you as Delegate, and legal votes given for me as Delegate, rejected by the judges; that the oaths of the judges and clerks are not prefixed to the poll-books; that the poll-books have not been signed by the judges and clerks; that the returns have not been made of votes legally taken for me, and improper votes have been admitted, and the votes counted for you; that the polls have not been opened and the votes counted by the clerks and two justices; and that the voters have not been permitted to give in their votes freely, and many who wished to vote for

me, have been, by threats and violence, prevented from so doing."

No notice was given by either party of the names of the electors objected against for want of qualifications; nor was either party notified by the other that the particular qualifications of the electors would be investigated, nor were the names of the magistrates stated before whom depositions were to be taken.

The sitting Delegate contends that he considered himself authorized, under his general notice, to examine witnesses to every point of objections which he might find himself able to support in the course of investigation. And the petitioner alleged that he did not suppose an investigation into the qualifications of the electors and the persons for whom they voted, to be admissible; that the only case in which that inquiry had been made in his behalf, related to the votes in the township of *Cote Sans Dessein*, which was done without his instruction or consent.

In the case of Joseph B. Varnum, a Representative from the State of Massachusetts, whose election was contested at the first session of the fourth Congress, the Committee of Elections, (we adopt the words of their report,) "as well from the difficulty of the case, as from a desire to have uniformity in proceedings of this kind, were induced to pray the instructions of the House as to the kind of specification that shall be demanded of the petitioner, and the manner in which the evidence shall be taken."

'Upon this application, after several days' debate in the Committee of the Whole, the House resolved, "That the names of the persons objected to, for want of sufficient qualifications, ought to be set forth prior to the taking of the testimony."

The rule prescribed in this resolution was adopted by the committee, in the case of McCoy and Porterfield, at the last session of Congress, and, as far as your committee are advised, has been uniformly adhered to; it is important, not only to the parties, but to this House, that it should be preserved. The committee were, therefore, of opinion that the evidence taken in pursuance of the beforementioned general notices, ought not to be received.

If the House concur with the committee in this opinion, it follows that no evidence has been submitted by either party, enabling the committee to investigate the qualifications of the electors.

The committee are further of opinion that evidence cannot be procured in season to enable the committee to investigate the qualifications of the electors during the present Congress. From Howard county on the north, to Arkansas on the south, as the roads run, is about eight hundred miles; the settlements extend west of the Mississippi from fifty to one hun-

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of Elections.

Certain evi-  
dence to be re-  
jected.

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dred and seventy miles; the Territory is divided into nine counties and about fifty townships.

In addition to the difficulties arising from the extent of territory, the law of Missouri prescribes no mode of taking evidence in cases of contested elections for Delegate to Congress; nor is there any territorial authority to compel the attendance of witnesses for that purpose. The great distance of the Territory from this place, renders it impracticable, even if the power should be granted, to send for the persons whose evidence is considered essential for the purpose of examination before the committee: the committee, therefore, respectfully submit to the House the following resolution:

*“Resolved, That the Committee of Elections be discharged from further investigation into the qualifications of the said electors.”*

On the 12th January, 1817, this amended report being before the House in Committee of the Whole, it was proposed to strike out from the preceding resolution all that occurs after the word *“resolved,”* and to insert the following, to wit: *“That the election in the Territory of Missouri has been illegally conducted, and the seat of the Delegate from that Territory is vacant. That the Speaker inform the Governor of that Territory of the decision of this House, that a new election may be ordered.”*

It was also moved so to amend the resolution as to give it the import that Rufus Easton was entitled to his seat.

Seat declared  
vacant.

This latter amendment was rejected by the House, and the former was passed, declaring the seat vacant.

# FIFTEENTH CONGRESS—FIRST SESSION.

## COMMITTEE OF ELECTIONS.

Mr. TAYLOR, of N. Y.	Mr. ROSS,
TAYLOR,	WHITMAN,
MERRILL,	STRONG.
SHAW,	

## CASE XLI.

CHARLES HAMMOND vs. SAMUEL HERRICK, of Ohio.

[The sitting member was elected to Congress in October, 1816, being then in commission as district attorney of the United States ; on the 29th of November, 1817, he resigned his office of district attorney, and on the 1st day of December following took his seat in Congress. It was decided that he was not rendered incapable of being a member of the House, by reason of his having held the said office after the 4th of March, and until the 29th of November, 1817. Inquiry as to the time when the rights of membership commence.]

DECEMBER 8, 1817.

The petitioner's memorial was presented, and referred to the Committee of Elections.

On the 10th of December, Mr. FORSYTH, a member from Georgia, offered the following resolution :

*“ Resolved, That the Committee of Elections be instructed to inquire and report what persons, elected to serve in the House of Representatives, have accepted, or held, offices under the Government of the United States since the 4th day of March, 1817 ; and how far their right to a seat in this House is affected by it.”*

The adoption of the resolution was opposed by Mr. TAYLOR, of New York, and others, as a novel proceeding, imposing inconvenient and extraordinary duties on the Committee of Elections, by requiring them to go through the alphabet from A to Z, and inquire into the qualifications of every individual member of the House. It was also opposed as imputing impurity to the House, not justly attributable to it, since the fact of taking the oath to support the constitution of the United States was *prima facie* evidence that the member taking it was conscious of having violated no provision of that instrument. If inquire, said Mr. T., into this qualification of members, why not, also, into others equally prescribed by the constitution ? It was time enough to inquire into the rights of members to their seats, when any specific allegation was made as to the want of qualification of any one or more of them.

Debate on Mr. Forsyth's resolution.

To which the mover (Mr. FORSYTH) replied, by expressing his surprise at the opposition to his motion. There was

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lution.

nothing in it, he said, which accused this House, or any part of it, of improper conduct. It neither charged the House with suffering members to remain who ought not, nor any member of the House with remaining when he ought not. The object was to inquire whether persons in certain situations had a right to a seat or not. It was presumed that those gentlemen so situated had examined their own rights, and were convinced of their title to seats here. But as he very much doubted the right of any person so situated to a seat in this House, he wished to have the question settled. If the House should be of his opinion, he should see, with great regret, any gentleman so situated return even temporarily to his constituents. As to specifying the members who would fall under this rule, Mr. F. said he did not know all there were; he had been informed there were ten or eleven members, whose right to a seat depended on a decision of this question; he did not know them: if he did, he should have no objection to comprehend their names in his motion.

The question was taken on the resolution, when there appeared 85 votes for it, and an equal number against it; and the Speaker desiring to have the constitutional question fully investigated, by his vote decided it in the affirmative. [See Nat. Int. of 11th January, 1817.]

#### DECEMBER 12.

Mr. TAYLOR, from the Committee of Elections, reported the following resolution:

**Resolved**, That the President of the United States be requested to communicate to this House whether any, and if any, which of the Representatives named in the list annexed, have held any office under the United States since the 4th of March, 1817, designating the office or offices they have respectively held; the time of appointment and acceptance of said offices; whether the same are now held, and if not, when the same were severally resigned." [Annexed to the resolution was a list of the names of the members of the fifteenth Congress.]

The foregoing resolution having been concurred in by the House, the President, on the 26th December, sent to the House a message containing the following list of persons, as embraced within the scope of the inquiry, to wit:

Members who  
have held Unit-  
ed States offi-  
ces after their  
election to Con-  
gress, and be-  
fore taking  
their seats.

John Holmes, of Massachusetts, commissioner under the fourth article of the treaty of Ghent; appointed 16th February, 1816, resigned 24th November, 1817.

Samuel Herrick, of Ohio, attorney of the United States; appointed 19th November, 1810, resigned 29th November, 1817.

Daniel Cruger, of New York, postmaster at Bath; appointed 29th June, 1815, resigned 1st December, 1817.

Elias Earle, of South Carolina, postmaster at Centreville; appointed in April, 1815, resigned 12th June, 1817.

Thomas H. Hubbard, of New York, postmaster at Hamilton; appointed 11th March, 1813, resigned 23d October, 1817.

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George Robertson, of Kentucky, principal assessor for the seventh collection district; appointed 4th January, 1815, resigned 5th June, 1817.

George Mumford, of North Carolina, principal assessor for the tenth collection district; no resignation has been received from Mr. Mumford.

Levi Barber, of Ohio, receiver of public moneys at Marietta; appointed 3d March, 1817, resigned 1st December, 1817.

John F. Parrott, of New Hampshire, naval officer for the district of Portsmouth; appointed 23d of April, 1816, resigned 15th November, 1817.

This message was referred to the Committee of Elections.

On the 5th of January, 1818, the Committee of Elections, to which was referred a memorial of C. Hammond, contesting the right of Samuel Herrick to a seat in this House, reported:

That, on the 19th December, 1810, Mr. Herrick was appointed attorney of the United States for the district of Ohio, which office he accepted and held until his resignation thereof, on the 29th November, 1817. In October, 1816, he was elected one of the Representatives of the State of Ohio for the fifteenth Congress. The result of the election was publicly announced on the 7th January, 1817, in the presence of the Senate of that State. On the 15th of September, 1817, the Governor executed a certificate of Mr. Herrick's election, according to the law of Ohio, which was received by him on or about the 30th day of the same month. Mr. Herrick, therefore, continued in office almost nine months after the 4th of March last, and two months after receiving the certificate of his election. It does not appear, on the part of the memorialist, and it is denied on the part of Mr. Herrick, that he performed any act as attorney of the United States, after the said 30th of September. He, however, continued in office, was liable to perform its duties, and was entitled to its salary until his resignation. Congress met December 1, 1817, and Mr. Herrick took his seat on that day in the House of Representatives.

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The sixth section of the first article of the constitution provides that "no person holding any office under the United States shall be a member of either House during his continuance in office." The incompatibility is not limited to *exercising* an office, and, at the same time, being a member of either House of Congress; but it is equally extended to the case of *holding*; that is, having, keeping, possessing, or retaining an office under such circumstances. If the membership of Mr. Herrick commenced either on the 4th of March, or the 30th of September, 1817, he has va-



1817. cated that membership by holding an office incompatible  
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See ante, p.  
 122.

We do not find that the question of incompatibility has been agitated in the House of Representatives on more than two occasions. The first case was that of John P. Van Ness, which occurred during the second session of the seventh Congress. The Committee of Elections were then instructed to inquire whether Mr. Van Ness, one of the Representatives from the State of New York, had not, after his election, *and after he had occupied a seat as a member*, accepted and exercised the office of a major of militia, under the authority of the United States, within the Territory of Columbia. Mr. Van Ness freely admitted the fact, as alleged, and thereupon the House unanimously resolved that he had thereby forfeited his right to a seat as a member of the House.

See ante, p.  
 224.

The other case was that of Philip Barton Key, decided at the first session of the tenth Congress. Mr. Key's seat was impeached, among other grounds, upon this: that, at the time of his election, and until a few days either before or after he took his seat, he held, from the British Government, in his own right and name, the half pay pension of a captain of infantry. The facts were briefly these: Mr. Key served as an officer in the British army, without the limits of the United States, from 1778 until 1783, when the corps to which he belonged was disbanded, and the officers placed on half pay. The pension was paid, either for the benefit of himself or his assignee, until the month of December, 1805, when he received six months' half pay. In January, 1806, he wrote to his agent in London, directing him to resign his claim to half pay, and also to rank, if any could be supposed to exist; but it did not appear that any thing had been done in pursuance of that letter, nor indeed that it had ever been received by his agent.

On the 6th of October, 1806, Mr. Key was elected a Representative of the State of Maryland for two years, commencing on the 4th of March, 1807. On the 24th of October following, he addressed a letter to Mr. Erskine, then his Britannic Majesty's ambassador at Washington, referring to the letter written to his agent, and repeating his resignation in a formal manner. This letter was not delivered to Mr. Erskine until the 28th or 29th of October, which was two or three days after the meeting of Congress, and after Mr. Key had taken his seat in the House of Representatives. Upon these facts the House decided that Mr. Key was entitled to his seat.

In regard to the several cases of Messrs. Turner, Dawson, and others, mentioned in the answer filed by Mr. Holmes, on the part of Mr. Herrick, we think a single remark sufficient. It does not appear that the House of Representatives was made acquainted with the existence

of these cases. It cannot, therefore, be considered to have acquiesced in that of which it was ignorant.

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The decisions of the House of Commons, under the statutes of 5 William and Mary, chap. 7; 11 William III, chap. 2; and 12 and 13 William III, chap. 10, may serve to shed some light upon the subject under consideration. The first of these statutes enacts that no member of the House of Commons shall, at any time, be concerned, directly or indirectly, or any other in trust for him, in the forming, collecting, or managing any of the duties granted by that or any future act of Parliament, except the Commissioners of the Treasury, and the officers and commissioners for managing the customs and excise. The second act extends the disqualification to officers of the excise, declaring them incapable of sitting, voting, or acting as members; and the last mentioned act applies the same provisions to all officers of the customs.

Many members of the House of Commons were, at different times, expelled for violations of these statutes; but the facts are reported in terms so general, that it is impossible, in most cases, to determine whether the offence was committed before or after the member took his seat in the House. We find, however, two cases where the particulars are stated. The first was decided on the 13th February, 1698, under the act above mentioned of the 5 William and Mary. It is the case of Mr. Montagu; and is stated as follows, by Hatsell in his *Precedents of Proceedings in the House of Commons*. The new Parliament was made returnable on the 24th of August, 1698, and was directed to sit for the despatch of business on the 29th of November. Mr. Montagu had been a commissioner of stamp duties, but in the commission which passed in September, 1698, he was left out; it appeared that he had acted under the former commission till the 4th of October, 1698. But, having informed the House that he did not qualify himself as a member till the 29th of November, and so conceived himself not to be within the law, he is, upon the question, called in to take his place, and a committee is appointed to draw up and state the matter of fact. It does not appear that the committee ever made report.

The other case is reported as follows: On the 5th of February, 1708, Sir Richard Allen was, on the hearing of his petition, declared to be duly elected for Dunwich. On the 7th of February, he surrenders an office in the customs for life, to which he had been appointed in May, 1678. On the 8th of February this surrender is enrolled; and, on the 9th of February, he desires the sense of the House before he takes his seat on the clause of the 12 and 13 of William III, chap. 10, which relates to the officers of the customs; and, upon reading the letters patent and surrender, he is permitted to take his seat.

Practice in the  
British Parlia-  
ment as to  
holding office.

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Inquiry when  
the incidents  
of membership  
commence.

Instances in the  
British House  
of Commons.

Persons elected to the House of Commons become, at one time, members for certain purposes, and at another time for other purposes. Thus, immediately upon executing the indenture of return by the sheriff or other returning officer, the person elected becomes entitled to the privilege of franking, although the day at which the Parliament is made returnable, may not have arrived. Yet he is not a member, for he may thereafter be a candidate for election in another district, at any time before the Parliament is made returnable, and the return actually filed in the Crown Office. From the time last mentioned, he becomes a member so far that he cannot be a candidate for another district, but yet he may thereafter hold an office incompatible with membership, and, upon resigning his office, he may immediately qualify and take his seat in the House. It has often been decided by their Committee of Elections, that a person holding an office incompatible with membership, is, nevertheless, capable of prosecuting his claim to a seat. After examination of all the parliamentary registers, histories, and journals within our reach, we have found no case where a person elected to the House of Commons was brought in on a call of the House before he had voluntarily appeared, qualified, and taken his seat, nor do we find any instance of a person having been expelled until after such time.

A very particular case occurred on the 10th of February, 1620. Sir John Leech having been duly elected a member of the House of Commons, and appearing to take the oaths of allegiance and supremacy, was asked whether he had not already sat in the House that Parliament in violation of the statute. He confessed that, on the Wednesday morning previous, he did sit in the House a quarter of an hour being unsworn. For this offence, Sir John was not expelled; but it was resolved that he was disabled to serve in the House, and a new writ of election was issued to supply the vacancy, in the same manner as if no election and return had taken place. The same course of proceeding has been pursued when a person duly elected, and returned, comes into the House and refuses to be sworn. Such was the case of Mr. Archdale, in the year 1698, who, being elected, and returned, came into the House of Commons, and said he was ready to serve, if his affirmation of allegiance could be accepted instead of his oath. The House resolved that it could not. Mr. Archdale still declining to take the oath, was refused admittance to a seat, and a new writ was issued to supply his place. This case is more peculiar, because a person elected to the House of Commons cannot relinquish his right to a seat either before or after qualification, otherwise than by accepting an incompatible office. But, by refusing to be sworn, he may do that indirectly which he is not permitted to do directly. We have seen several similar cases which occurred in the Colonial Assembly of New York, but

not now having access to the journals, we are unable to report the particulars.

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Persons elected and returned to the House of Commons, may be chosen members of committees before they appear and qualify. But it is allowed, for a reason similar to that which, in courts of law, permits a declaration to be filed *de bene esse* before the defendant appears in court. In both cases the act is conditional ; and it is ineffectual unless the condition of appearance be performed.

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The practice of this House, which does not allow the appointment of persons to be members of committees, until they shall have been sworn, and shall have taken their seats, is obviously more reasonable and convenient than the other. It was decided as early as the first session of the second Congress, in the case of John F. Mercer, who was chosen to supply a vacancy in the representation of the State of Maryland, occasioned by the resignation of William Pinkney, that a Representative elect might decline his election before taking a seat, and before the first session of the Congress to which he was elected. We do not find that the question has since been agitated, although similar cases have often occurred. Our rule in this particular is different from that of the House of Commons ; it is also better, for it makes our theory conform to what is fact in both countries, that the act of becoming in reality *a member of the House*, depends wholly upon the will of the person elected and returned. *Election* does not, of itself, constitute membership, although the period may have arrived at which the congressional term commences. This is evident, from the consideration that all the votes given at an election may not be received by the returning officer in season to be counted, whereby a person not elected may be returned, and take the seat of one who was duly elected. Neither does a *return* necessarily confer membership ; for, if he in whose favor it be made, should be prevented taking a seat at the organization of a House of Representatives, he might find, upon presenting himself to qualify, that his return had been superseded by the admission of another person into the seat for which he was returned.

What consti-  
tutes member-  
ship.

At an election held in the State of Georgia, in October, 1804, Thomas Spaulding was duly chosen a Representative to the ninth Congress ; but because the votes of three counties were not returned to the Governor within twenty days after the election, Cowles Mead received a certificate, and took his seat. Mr. Spaulding afterwards presented his petition. The House vacated Mr. Mead's seat, and admitted Mr. Spaulding.

Former prac-  
tice referred  
to.

In April, 1814, Doctor Willoughby was elected a Representative of the State of New York, to the fourteenth Congress ; but, by reason of a clerical error of certain inspectors, in returning certificates of votes to the office of the county

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clerk, Gen. Smith was declared duly elected, and a certificate of election was accordingly delivered to him ; but he, having omitted to take a seat at the commencement of the session, was, on the ninth day thereafter, declared not entitled, and thereupon Doctor Willoughby was admitted in his stead.

Several other cases might be cited where persons were returned, who never, in fact, became members, and where others became members who were not returned. Neither do *election and return* create membership. These acts are nothing more than the designation of the individual, who, when called upon in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right ; for a person may be selected by the *people*, destitute of certain qualifications, without which he cannot be admitted to a seat. He is, nevertheless, so far the Representative of those who elect him, that no vacancy can exist until his disqualification be adjudged by the House. Yet it would be easy to state cases where he would not be permitted for a moment to occupy a seat, notwithstanding the regularity of his election and return. To no practical purpose could he ever have been a member. So, also, if a person duly qualified be elected and returned, and die before the organization of a House of Representatives, we do not think he could be said to have been a member of that body, which had no existence until after his death. We say which had no existence ; for we consider that conceit altogether fanciful, which represents one Congress succeeding to another as members of the same corporation. It has no foundation, either in fact, or in the theory of our Government. Each House of Representatives is a distinct legislative body, having no connexion with any preceding one. It commences its existence unrestrained by any rules or regulations for the conducting of business, which were established by former Houses, and which were binding upon them. It prescribes its own course of proceeding, elects its officers, and designates their duties. Even joint rules, for the government of both Houses of Congress, are not binding upon a new House of Representatives, unless expressly established by it. Although the fourteenth Congress had never assembled, the fifteenth would have met, under the constitution, clothed with every legislative power as amply as it was enjoyed by the thirteenth. The constitution does not define the time for which Representatives shall be chosen. It is satisfied, provided the choice take place at any time in every second year. The rest is left to the discretion of each State. Accordingly, in some States Representatives are usually chosen for one year and seven months, and in other States for a longer time.

The privilege of exemption from arrest, granted by the



constitution to Representatives before a meeting of the House, and after its adjournment, furnishes no argument in favor of their membership at such times. Exemption from arrest is a privilege as old as the Parliament of England. There it is extended, not only to members, but to their servants, horses, and carriages. Our constitution adopts the very words of the common law, but restricts the privilege to members. In both countries the object is the same, not the benefit of the member, but of the public service. It is an essential incident to the right of being represented, and a consequence of that right. But that membership is not co-extensive with the enjoyment of that privilege, is manifest from the consideration that such a construction might make the members of one Congress continue in office, not only after the Congress had expired, but also after the next Congress was actually in session. This construction, therefore, is not only absurd, but it serves to illustrate the fallacy of that suggestion which fancies the Representatives of one Congress succeeding to the seats of their predecessors as members of the same corporate body.

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The privileges of franking letters, and of exemption from militia duty, are not granted by the constitution. They are established by law, and liable to be changed at the will of the Government. They have been extended, and may be restricted as public convenience shall require. Previous to the last Congress the privilege of franking was not enjoyed until after the commencement of each session. But as that does not prove negatively that persons elected to the House of Representatives were not members before that time; so the existing law does not prove affirmatively that they are. It is true that the words "members of the House of Representatives" are used as descriptive of the persons to whom the privilege is granted, but it certainly was used without intending thereby to express an opinion, much less to decide when membership commences, and probably without in anywise adverting to that inquiry. The late war had created claims in every part of the country, which it was found convenient to send by mail to those who were elected to Congress in the several districts previous to their leaving home. The law was passed with a view to the convenience of these public claimants, as well as to that of the Representatives elected. We have seen that in England this privilege is enjoyed before the commencement of membership, and probably for a reason similar to that above mentioned.

Inquiry contin-  
ued as to the  
time when one  
becomes a  
member.

It is not now necessary to inquire what construction ought to be given to the act which exempts "members of both Houses of Congress" from the performance of militia duty. We do not know that it has ever received a judicial exposition, and we presume that the practice under it by the



1817. officers of the militia furnishes no very high authority on  
 15th CONGRESS, the constitutional question before us.  
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**Report of the Committee of Elections.** In regard to the danger apprehended from Executive influence in the concerns of legislation, we might rest satisfied with the remark that the business of *forming* a constitution is not confided to us. Ours is a more humble duty; it is to expound the text by a fair interpretation. We can neither add nor diminish. The object of our inquiry is, not what ought to be, but what is.

Whoever looks into the constitution will find provisions to guard the entrance of the legislative hall against those whose personal and immediate interest would be advanced by perpetuating offices and increasing salaries, but he will find more for the purpose of excluding the influence of Executive patronage. The framers of the constitution either did not apprehend danger from that source, or they thought it impracticable to prevent it without hazarding still greater mischief. The great offices of the Union are objects of high and honorable ambition. They are left as open to the members of this House as to others, and they can only be obtained through Executive favor. Nay, laws may be passed on the last day of a Congress, creating offices, and fixing their salaries, and, on the next day, the members by whose votes they were created, may be appointed to fill them. The only antidote provided against an abuse of this pervading influence is the elective franchise. No dependant on the Executive can take a seat in this House. If any member become such, his seat is vacated; his power returns to the people. By a faithful and intelligent exercise of it, they may correct errors and punish delinquency. This is the regenerating principle of the constitution. If this remedy fail, it will be vain to look for another. The constitution was provided for a brave, wise, and virtuous people. If the citizens of the United States ever cease to deserve this character, our present political institutions will be found unsuited to their condition. This is the only constitutional answer we can give to the suggestion of possible danger from Executive influence.

**Opinion in favor of Mr. Herrick, the sitting member.**

In fine, we have examined the memorial of Mr. Hammond with deliberate attention, and are of opinion that Mr. Herrick has not rendered himself incapable of being a member of this House, by reason of having held the office of attorney of the United States after the 4th of March, and until the 29th of November last.\* We subjoin hereto the said memorial, Mr. Herrick's answer, and also an answer filed by Mr. Holmes, on the part of Mr. Herrick, and respectfully submit the following resolution:

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\* It has been decided in the British Parliament that "if a person elected *divests himself* of office before he takes his seat, he is eligible." [See note to Disney's Collection of Acts of Parliament, p. 20.]

**“Resolved,** That Samuel Herrick is entitled to a seat in this House.”

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**Ordered,** That said report be committed to the Committee of the Whole House on Wednesday next.

The following is the petitioner's memorial :

*To the honorable the House of Representatives of the United States in Congress assembled :*

The memorial of the undersigned, a citizen of the United States, and a resident and elector in the fourth congressional district of the State of Ohio, Petitioner's memorial.

**RESPECTFULLY REPRESENTS :**

That at the general election held in the State of Ohio, in the month of October, in the year 1816, Samuel Herrick, Esq. was duly elected to represent the fourth congressional district of the State of Ohio, in the fifteenth Congress of the United States. That on the 7th day of January, 1817, agreeably to the laws of said State, he was declared duly elected by the Governor and Secretary of State, in the presence of the Senate of said State. That he has obtained a certificate of his election, has appeared and taken the oaths required by law, and now holds and occupies a seat in your honorable body, as one of the Representatives of the State of Ohio.

Your memorialist further sheweth, that, at the time Mr. Herrick was elected a member of the House of Representatives, he held the office of United States district attorney for the Ohio district, which office Mr. Herrick continued to hold, and continued to perform the duties thereof, and to receive the compensation attached thereto, until the month of September, in the year 1817 ; nor is it known to your memorialist that Mr. Herrick has yet resigned the said office.

Your memorialist further sheweth, that the office of United States district attorney is an office created by a law of the United States, and the persons appointed to discharge the duties of said office are nominated and appointed by the President, by and with the advice and consent of the Senate of the United States, and hold their offices during the pleasure of the President, and, besides perquisites of office, receive an annual compensation from the Treasury of the United States.

Your memorialist further sheweth, that, by the sixth section of the first article of the constitution of the United States, it is, among other things, provided and declared that *“no person holding any office under the United States shall be a member of either House (of Congress) during his continuance in office.”*

It is conceived that the Congress of the United States is a political institution of continual duration. Composed of the President, the Senate, and the House of Representatives, it

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must always be in existence while the Government exists. The members of all its component parts, though appointed for different, are still appointed for determinate periods. The moment the term of the predecessor expires, that of the successor commences, unless from some cause such successor has not been selected in the manner pointed out by the constitution. The commencement of every term is upon the 4th of March, that of the President every fourth, that of the Senate every sixth, and that of the House of Representatives every second year. And although it may possibly happen that the seat of a single member, or the representation of one or more States, may be vacant, yet this fact cannot possibly affect the continual existence of the institution itself, for if the Congress once ceases to exist, the Government must from that instant be terminated.

As the members of the House of Representatives are appointed for but two years, and the other branches are appointed for a longer period, the election of a new House of Representatives is considered as constituting a new Congress. The present Congress is denominated the fifteenth Congress of the United States: but this description must be referred to the members who compose the Congress, and not to the institution itself. Though, at the end of the biennial term of the Representatives, that branch of the Congress becomes necessarily disorganized, still the Congress exists. The other branches are in complete organization, and the members of the representative branch are legally in existence, ready to be organized should occasion require it.

All the rights and all the privileges of their station attach to the members elect, the moment their term commences. There can be no space of time between the termination of one Congress and the commencement of another. The fifteenth Congress existed on the 4th of March, 1817, as certainly as it now exists. The members of the Senate and of the House then elected, but who had not qualified themselves to act by taking the necessary oaths, were, notwithstanding this fact, members of Congress. The term of Mr. Otis, in the Senate, and of Mr. Herrick, in the House, commenced at the same instant of time. Both were members: the President's proclamation convening the Senate, called Mr. Otis to the immediate performance of his duties; but it could not constitute him a member of Congress. A proclamation convening the House of Representatives would have operated in the same manner upon Mr. Herrick; and certainly, notwithstanding that the States of Virginia and North Carolina had omitted to appoint their representation, the President could have called the fifteenth Congress to meet upon the 4th day of March, 1817.

An opinion seems to have prevailed, that a person elected a member of Congress is not, in fact, a member until he shall have declared his acceptance of the appointment, by

taking the oaths necessary to qualify him to discharge his duties on the floor. This opinion assumes that although the appointment is complete, and the term commenced, still the seat remains vacant until the person appointed shall signify his pleasure upon the subject. This position is regarded as wholly untenable.

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Either Mr. Herrick was a member of Congress on the 4th of March, 1817, or he was not a member. If he was a member, there could be no vacancy; if he was not a member, by what authority does he now occupy his seat?

The constitution of the United States provides that "*the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof*;" and it also provides that "*when vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies*." On the 14th of February, 1812, the Legislature of Ohio prescribed that, on the second Tuesday of October, 1812, the electors in that State should elect suitable persons to represent that State in Congress, for a term of two years, to commence on the 4th day of March, 1813; and they further prescribed "that at every period of two years from the said second Tuesday of October, the electors of each congressional district in that State shall, in like manner, vote for a suitable person to represent that State in the Congress of the United States, for the term of two years, to commence on the 4th day of March next thereafter."

Under these provisions of constitutional and statute law, on the second Tuesday of October, 1816, Mr. Herrick was elected to represent the State of Ohio, in Congress, for the term of two years, to commence on the 4th day of March, 1817. By this election, the constitution of the United States, and the law of Ohio, were completely executed. Their office was performed, and no election could be held, except to fill a vacancy, until the recurring term of two years. If, after this, Mr. Herrick should die before the meeting of Congress, the Executive must issue his writ to supply the vacancy; and it seems difficult to comprehend how, if Mr. Herrick never was a member of Congress, his death could leave a vacancy to be filled by special election.

That persons elected members of Congress are legally members before they qualify by taking the oaths, is evident, from the practice under the constitution, in various particulars. It is provided by the sixth section of the constitution, that the members of Congress shall be privileged from arrest in certain cases, during their attendance at the session, and *in going to* and returning from the same. This privilege attaches to the members before they take the oaths, when *going to* attend the first session after their election. If they were not members until the oaths were taken, this could not be the case.

The militia law of the United States exempts "the MEMBERS of both Houses of Congress" from the performance of

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militia duty. This exemption has always been considered as attaching to the members from the commencement of their term. And, in like manner, the privilege of franking is claimed and exercised by the members elect before they take their seats. In the cases here enumerated, the practice is undoubtedly predicated upon the hypothesis that the persons elected to Congress are members from the commencement of their term.

If, then, according to the constitution, the person elected a member of Congress becomes a member upon the day at which his term commences, your memorialist conceives that upon that day he must be capable, under the constitution, of occupying his seat in the proper House. A person holding upon that day an office under the United States is not thus capable. On the 4th of March, 1817, Mr. Herrick held the office, and received the emoluments of United States district attorney for the Ohio district. This is an office under the United States, and the constitution expressly declares that "no person holding *any* office under the United States shall be a member of either House of Congress during his continuance in office." *He shall not be a member.* If Mr. Herrick was not a member while he held his office, he cannot now be a member. If he was a member, and at the same time held an office under the United States, it would seem that the constitution is inoperative in his particular case.

The language of the constitution is clear and explicit. It did not mean to prohibit a person from performing the duties of a Senator or Representative, and the duties of any other office at the same time. Its object was to render the holding of an office under the United States, and the appointment of a member of Congress, utterly incompatible. The interpretation by which Mr. Herrick can hold his seat, permits him to be a member of Congress, to enjoy the privileges and exemptions of a member of Congress, and to continue for nine months afterwards, and longer if he pleases, to hold and receive the emoluments of an office under the United States. Your memorialist most respectfully begs leave to insist that this interpretation never was contemplated by the framers of that instrument. Its purposes cannot be mistaken. It intended, by shutting out from both Houses the dependants and the creatures of the Treasury, to close the doors of the Legislature against undue Executive influence. And this was done to preserve the American Congress from the baneful consequences of that indirect and invisible system of bribery which corrupted and disgraced the British Parliament.

The provision of the constitution occasions an absolute incapacity. A person elected to Congress, who, after the commencement of his term, continues to hold or accepts an office under the United States, is incapable of membership in the one case, and in the other vacates his own seat. Adopt a different construction, and Congress may soon be filled with men who receive Executive appointments after their elec-



tion, and resign them only long enough to serve Executive purposes in the Legislature. Surely it cannot be necessary to an upright, intelligent, and enlightened legislation, that Congress should strain for an interpretation of the constitution, by which they may retain among them as members, men so fond of distinction, or so greedy of gain, as to place themselves upon a level with the menial instruments of the most corrupt Government upon earth. For here your memorialist must beg leave to suggest, that it can seldom happen that a high-minded and honorable man would wish to retain an employment under those whom, in discharging a trust of great confidence, he may soon be compelled to oppose or control.

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The view which your memorialist has taken of this subject, carries conviction to his mind that Mr. Herrick, by retaining his office, rendered himself incapable of a seat in Congress; that, consequently, he has by his own act vacated his appointment, and has no right to a seat in your House. Your memorialist, therefore, prays that your honorable body will examine into the matters herein alleged, and that you will vacate the seat now occupied by Samuel Herrick, Esq. as a Representative in the fifteenth Congress from the fourth congressional district in Ohio.

And your memorialist will pray, &c.

C. HAMMOND.

#### LETTER OF MR. HERRICK.

*To the honorable Mr. Taylor,*

*Chairman of the Committee of Elections :*

SIR: The question submitted for the consideration and report of the committee is, whether a person elected a Representative to Congress on the second Tuesday of October, 1816, received the certificate of his election about the 1st day of October, 1817, and who has held the office of attorney of the United States, before and after the 4th of March, and down to the 29th of November, 1817, and no longer, is entitled to his seat as a member of Congress in the House of Representatives on the first Monday of December following, under the constitution of the United States, or not. This is the question, and those are the facts which make the case for the report of the committee. I am thus particular in stating the facts which make the case, in order that it may be decided upon its own peculiar merits, unconnected with the facts and circumstances which may relate to the case of any other gentleman, (if any such there are,) whose situation may be similar in some, though not in all respects to mine. Not because I know, or even suspect, that the facts connected with this case are more favorable to my holding my seat, than the facts relating to the case of any other gentleman may be favorable to him; but because I think it just that this, like every other case of individual right, before this, as be-

Sitting mem-  
ber's reply to  
petitioner's me-  
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fore every other tribunal, should stand upon its own base, and be decided according to the facts and circumstances of each particular case. The constitution, by which the several departments of the Government has been created, is the only authority essentially connected with, or that has any bearing on the question. As well may we call to our aid the by-laws of the corporation of the city of Washington or of Alexandria, in giving a construction to that instrument, as the laws of the State of Ohio, or of any other State in the Union. I mean no disrespect to the laws of any State. They are all wise and proper, (I presume,) within their respective spheres; but they have no bearing on the question. Taking the constitution for our only text and guide, does it prohibit a person, thus situated, from becoming a member of Congress? I think not. He is not precluded, either by the words or the spirit of the constitution. That part of the constitution, and the only part that is regarded as prohibitory, in the sixth section of the first article, reads as follows: "And no person holding any office under the United States shall be a *member* of either House during his continuance in office." What, sir, is necessary to constitute a person a member of Congress within this provision of the constitution? Does the mere act of the people, by electing him their Representative, either in fact or in law make him a member of Congress? I think not, sir. For, if so, the mere nomination of the President, or the mere nomination of the President with the approbation of the Senate, may constitute a judge in law or in fact of one of your courts an ambassador, a consul, or any other officer which the President and Senate have the power, under the constitution, of appointing; and that too with or without the consent of the person thus nominated, without any evidence of his acceptance, and without his taking the oath of office, as prescribed and required by law: a doctrine which, I presume, would not be contended for even by the memorialist himself. And yet this position, as preposterous as it manifestly is, is nevertheless correct, if the election of a Representative by the people, without any act on his part, evidencing his consent or proving his acceptance, will constitute him a member of Congress. So far is this from being the law, as it regards this case, that I believe in every instance, as well under the Government of the United States, as under the several State Governments, there is always one or more acts to be performed, both by the candidate or contemplated officer, and by the Government or people, as the case may be; all of which must be performed before any person can be constituted an officer, either in law or in fact; and such is peculiarly the case as it respects a member of Congress. First, the people must elect him. Second, the votes must be canvassed. Third, his election must be duly proclaimed. And fourth, the evidence of his election, and certificate of the fact, must be made out and furnished him by the Executive of the State. All these acts

are required to be performed by the people and the Government, and that too before the person elected is bound even to *know* that he is elected ; and even then it would be unreasonable to say that the person elected should not have some little time to reflect on the subject, and to make up his mind whether he would resign one office to accept of another. But the performance of all the acts above mentioned do not constitute him a member of Congress. He is merely a Representative elect ; an inchoate or inceptive member.

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There are yet two other acts to be performed, one by the Government, another by the inchoate member or the Representative elect, before his right to his seat is consummated, and before he is, agreeably to the language and spirit of the constitution, a member of Congress. He must appear in this place, and consent to take the oath as prescribed to support the constitution, and the Speaker must administer that oath to him. This act of his, in *consenting* to take the oath, is the only legal evidence, known to your constitution or laws, of his having *accepted* the office ; and his having *taken the oath*, is the only legal evidence that he is in law and in fact a member of Congress, the other acts enumerated having also been performed. This case may be assimilated to that of any other contract made when the people or the Government form one party, and an individual the other party ; or to that of a contract made by two individuals ; the assent of both to the contract must be proved, or it is no contract. If all the acts which I have enumerated are not necessary to be performed, to constitute a member of Congress, how many are necessary ? Where is the dividing line drawn ? And by what is it drawn ? The constitution has drawn no line between the performance of the whole or a part of those acts. And upon the same principle that the performance of any one of those essential acts and conditions to constitute a member may be dispensed with, the whole may be dispensed with, and a person is equally a member of Congress, with or without the consent of the people, or of his own consent. It is contended that a Representative elect, in the State of Ohio, and before he takes the oath required by the constitution, was, on the 4th of March last, a member of Congress, or he was not a member ; if a member, he could not hold the office of attorney ; and if not a member, there was a vacancy, and the Executive should or might have issued a writ, ordering a new election to fill the vacancy. To support this position, a statute of Ohio is cited, and which, it is said, provides for the election of a Representative on the second Tuesday of October, for the term of two years, to commence on the 4th day of March thereafter. That there is such a statute, is not denied. I have, however, before entered my protest against the propriety of dragging in the statute of any State, to control or vary the correct meaning and construction of the constitution of the United States. From whence, sir, did the Legislature of Ohio derive their autho-

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rity to pass a statute determining when the office of a member of Congress shall begin, or when it shall end, or how long it shall continue? Surely not from this constitution.

The only power given by the constitution to the State Legislatures on this subject, is that of prescribing the times, places, and manner of holding elections, fourth section, first article.

The second section of the first article of the constitution provides for the election of the Representatives every second year by the people of the several States, without fixing any *time* when the office shall commence. As then neither the constitution, nor any law made by the authority of that instrument, fixes the time when the office of a member of Congress begins, it is but fair to conclude that it was the intention of the convention that the office should commence at the time the oath was administered to the Representative by the Speaker, and not before. Or otherwise, that convention of statesmen, good and wise as they were, would expressly have fixed on some other and earlier period, and not have left the question open for construction.

I accord with the position assumed, that a Representative elect, on the 4th of March, and before he takes the necessary oath, was a member of Congress, or he was not a member, within the sixth section of the first article of the constitution: I maintain the negative of this position. If a Representative elect was, on the 4th of March, and before he took the oath, a member, then not only all the rights and privileges of a member instantly attach to him, but also all the rights and privileges of the people on their Representative, as instantly attached to them. I presume it will not be said that the rights of the Representative elect on the people attach to him before the rights of the people on him attach to them. No, sir; those respective rights have a simultaneous beginning: and suppose the President had thought proper, on the 4th of March, or soon thereafter, to have called an extra session of Congress, (as he had a right to do,) and the Representative elect, before he had taken the oath, had been summoned to attend at this place, and refused obedience to the summons, could his obedience have been forced? No, sir. And suppose, on the 1st of December, the constitutional period for the meeting of Congress, the House had met, and there not being a quorum to do business; suppose a member elect, but who had not been sworn into office, was walking the streets of this city, attending to his ordinary private concerns, with the certificate of his election in his pocket, as made out by the Executive of the State, could the House compel the attendance of such Representative elect? Or suppose the Sergeant-at-arms should seize the Representative elect, and drag him before the House, *vi et armis*, and Mr. Speaker should rise with his bible in his hand, and order him to be sworn, and to repeat the form of the oath after him, and the Representative should refuse, by saying he would

not repeat the oath, he would not be sworn, and that he would not perform the duties of a member: I ask, would not Mr. Speaker, and would not the House, to use a homely phrase, be at the end of their tether? And why? Because a Representative elect cannot perform any duty enjoined upon him by law, before he has taken the oath of office, and he cannot take the oath before Congress convenes, and which is the only legal, unequivocal, and certain evidence that he has accepted the office, and has become a member. Nor do the rights and privileges of a *member* of Congress instantly attach to a Representative elect on the 4th of March, and before he takes the oath of office. If he, *indeed*, takes the oath on the 4th of March, I agree that his rights and privileges attach to him, in the manner as prescribed by the constitution, so soon as he takes the oath, and *not before*.

It will be perceived, sir, that there is an evident distinction running throughout the constitution, between the meaning of the word Representative and the word member. The word *Representative*, as used in the constitution, signifies a person who has been elected, but not *qualified to act*: to him the rights and privileges of a member do not attach. The word *member* signifies a person who has not only been elected, but has taken the oath of office. It means a member; *de jure* and *de facto* to him the rights and privileges do attach. Thus, for example, in the fourth section of the first article, "the times, places, and manner of holding elections for Senators and *Representatives* shall be prescribed in each State by the Legislature thereof;" not for Senators and *members*. And again, by the fifth section of the first article, "each House shall be the judge of the elections, returns, and qualifications of its own *members*," not of its own *Representatives*, "and a majority of each shall constitute a quorum; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent *members*," not the attendance of absent *Representatives*. "Each House may determine the rules of its proceedings, punish its *members*," not its *Representatives*, "for disorderly behavior, and, with the concurrence of two-thirds, *expel a member*," not *expel a Representative*. And the sixth section of the first article, called the *prohibitory* section, does not say that a person holding any office under the United States shall not be a *Representative* during his continuance in office. It says, no person holding, &c. shall be a *member* of either House during his continuance in office. And however it may have been the fact in some instances, that Representatives elect, before they were qualified and took their seats in the House, may have claimed exemptions from the performance of military duties, (as is alleged by the memorialist,) and the benefit of the privilege of franking letters, &c. (though I do not know that it is a fact that any gentleman has done it: I can answer for one, that I have not done it,) yet I very much doubt whe-

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ther the practice is warranted by the true construction and spirit of the constitution. Again, sir, if the convention who framed the constitution intended that no person holding any office under the United States should be a Representative elect during his continuance in such office, they would have employed the necessary and appropriate language for the expression of that intention, as they certainly were capable of doing, and not employed the language here used.

If such had been their intention, the convention would have employed the same language which they have used in the second section of the first article, where they have clearly expressed such intention, when they say, "no person shall be a *Representative* who shall not have attained to the age of twenty-five years, been seven years a citizen of the United States, and an inhabitant of that State in which he shall be elected." So, in the first section of the second article, "no Senator or Representative, or person holding any office of trust or profit under the United States, shall be appointed an elector." Here the convention has not only said that a person holding an office under the United States shall not act as an *elector*, but that he shall not be a candidate; *he shall not be appointed an elector*.

I have only to add, sir, that if a contrary doctrine prevails, it will have the effect, in many instances, of defeating the views and thwarting the wishes of the people. It will have the effect, in some instances, of limiting the number of persons out of whom the people will be permitted to select their candidate for a member of Congress. I can assure you, sir, that I should not have permitted my name to be used as a candidate, if I had not most conscientiously believed that I had the right, lawfully and equitably, to hold the office of attorney (as inconsiderable as the emoluments of that office are) until I *took the oath* as a member of this House. For, by taking a seat in this House, I have not only resigned the office of attorney of the United States, on the 29th November, (which I did cheerfully at the time,) but shall also suffer a considerable loss by neglecting the practice of my profession as a lawyer, which has heretofore been profitable. The latter loss I believed would be as great as my pecuniary circumstances could comfortably sustain, for the honor of holding a seat in this House, *without* resigning the office of attorney, *long before* I became *in fact* a member of Congress.

I have the honor to be, &c.

SAMUEL HERRICK.

WASHINGTON, Dec. 29, 1817.

*Answer of Mr. Holmes, filed in behalf of Mr. Herrick.*

Mr. Holmes's  
answer for sit-  
ting member.

Mr. Herrick is duly elected a Representative in the Congress of the United States, from the State of Ohio. At the time of his election, and until after the 4th of March last, he



held the office of attorney of the United States for the district of Ohio ; which office he resigned before the commencement of this session of Congress.

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Upon these facts his right to a seat is contested. In the sixth section of the first article of the constitution of the United States, it is provided that " no Senator or Representative shall, during the term for which he was elected, be appointed to any *civil* office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person holding any office under the United States shall be a member of either House during his continuance in office." The first clause affects the *office*, the last the *membership*. The first prohibits the Executive from taking away a Representative from the people, and very properly extends it to the whole period " for which he is elected." And it guards against the temptation to create offices for our own emolument.

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ting member.

Had the prohibition, in the other clause relating to *membership*, been intended to extend to the same period of time, it would have been so expressed : the sentence would have then stood, " and no person holding any office under the United States during the time for which he was elected, shall be a member of either House." The changing the phraseology in the same paragraph, would not have been without design : the prohibition does not extend to the time for which he is elected, nor even in which he is a member, but is expressly limited to *his continuance in office*.

When the constitution disqualifies a person from serving the people as their Representative, the reason of the disqualification is apparent. By the second paragraph of the second section of the same article, no person shall be a Representative who shall not, *when elected*, be an inhabitant of the State. The *inhabiting* is required *at the time of his election*, that the people may know his ability and his principles, and he may understand their interests and inclinations.

The first and principal inquiry then is, was Mr. Herrick, in the sense intended in this clause of the constitution, a *member* of this House " during his continuance in office ?"

It would be difficult to perceive how a person can be a member of *either House* until he has met with the others, taken the oath, and submitted to the usual organization. Before this he has no powers as a *member*. He can do no *act* in that capacity. He is, to be sure, a Representative or member *elect*, but he is not a member of the *House* until that House shall have judged of his " election, return, and qualification."

A person cannot be a member until he accepts the appointment. This is not done until he appears and expresses his willingness to act, or, *at least*, claims some privilege of his election. Many members do not receive their *credentials* until they arrive at the seat of Government. A notice



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that they are chosen does not make them *members*, nor is it evidence of their acceptance. When they *elect to act*, they signify their acceptance; when they are *qualified*, they be-

come *members*.

The word "*member*" is used, throughout the constitution, to signify a constituent branch of an *organized House*. Thus the *House of Representatives* is to be composed of *members*, &c. The Senate may convict, on impeachment, with the concurrence of two-thirds of the *members* present. Each House shall be the judge of the election, &c. of its own *members*, may punish its *members* for disorderly behavior, and, with the concurrence of two-thirds, expel a *member*. At the desire of one-fifth, the yeas and nays of the *members* are to be entered on the journals, and there is no instance in which they are spoken of as *members*, except as constituting a *House*, unless the power to compel the attendance of *absent members* is an exception. If this power extends to compelling the attendance of those who have *never taken their seats*, it would seem that in *one* instance the constitution describes persons as members before they are qualified. But it is at least doubtful, whether a *minority* of the House can exercise forcible means to bring in a man who has never taken the oath, nor submitted to the rules. It is not readily perceived what officer could be employed to execute a *cupias* upon a member elect, in a remote part of the country, who had never submitted to the authority of the House, nor signified his acceptance of his place.

If the expression is intended to extend to those only who absent themselves *after* they are qualified, it is not an exception. But, at *most*, it is not an exception. It speaks of the *House* compelling the attendance of *absent members*, or *members elect*. The word *absent* qualifies the meaning. Besides, it only proves that the Representatives are called members *after* the commencement of the session, which might be safely admitted.

When they are spoken of in the constitution in relation to other times than while in session, they are invariably called *Senators and Representatives*, and not *members*. Thus no person shall be a *Representative* who shall not have attained to the age of twenty-five years, and, *when elected*, be an inhabitant of the State; so of a Senator. The times, &c. of holding the elections of *Senators and Representatives*, shall be prescribed by the Legislatures of the States. Senators and Representatives shall receive a compensation, and be privileged from arrest. These privileges embrace the time in which they are members, and *more*; including their *going and returning*. No Senator or Representative shall, *during the time for which he is elected*, be appointed to any civil office, &c.; and then comes the clause under consideration, that no person holding an office *shall be a member*.

This being the solitary instance, among so many, in which

the word is extended beyond the session, there should be some good reason for this difference of its meaning. Now, what is the reason? Does the office influence the election? The objection comes too late. It seems to be agreed that a person may hold his office at least to the time of his election.

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ting member.

Does it influence the conduct of the member? The office ceases before he begins to act. There are very good reasons why a person shall not be a *member* during his continuance in office. His duties as a Representative are not to be interrupted by the duties of his *office*, nor his motives perverted by *Executive influence*. If, before he is called to act as a Representative, he is disincumbered of the office, the former reason ceases; and why does not the latter? Can it be pretended that, because he *has had* an office, the influence continues after the office ceases? Is a Representative *purified* if he resigns an office on the 3d, and polluted if he holds it to the 4th of March? A doctrine like this leads to the most palpable absurdities. The election in New York is twenty months before the usual session in which the Representatives are to serve. That in Tennessee, about four months. Suppose a gentleman in each State to be appointed to an office of the *same kind*, on the *same day*. They both hold their offices *up to* the day in which the election takes place in Tennessee, resign on the same day, are chosen to Congress, and take their seats. Yet, because the gentleman from New York held his office after the 4th of March, and *after his election*, and the gentleman from Tennessee held his to the same time and *up to* his election, the latter is qualified, and the former disqualified. Here are two gentlemen, who hold their offices and take their seats contemporaneously, and one is admitted and the other rejected, and the reason is, that the one would be under Executive influence, and the other would not. It is a poor compliment, indeed, to those venerable sages who framed the constitution, to suppose them capable of such palpable absurdities.

At the time the federal constitution was framed, an opinion had long prevailed that executive and judicial officers ought not to partake in legislation. It was deemed expedient that the three departments of Government should be kept distinct, lest members of a Legislature, holding offices under the Executive, might be too much inclined to yield to his will, and extend his power. But it would have betrayed unreasonable jealousy to apprehend that gratitude for *past*, or hopes of *future* favors would lure a member from his duty. Had the framers of the constitution apprehended any danger from this source, they would have defined and *equalized* the time that an office must be executed, before the incumbent could act as a legislator. And they would have especially extended their prohibition to a period *after* the legislator's power had expired. Men are less inclined to be

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influenced by gratitude, for *past*, than hopes for *future* benefits. Selfishness induces the belief that when the office is executed, the account is balanced. But the hopes of *future smiles* afford a much stronger inducement to a member to forget his constituents, and cling to the Executive.

But it is insisted that Congress is a *perpetual body*, and as soon as one House expires another springs into existence. Visionary as is this theory, it becomes us to notice it. The constitution has provided that the House shall be composed of members chosen every second year, but has not defined at what time their period shall commence. It is the *law* that has established the 4th of March as the commencement of the two years *within which* a Congress shall meet and act. The time of election, however, is still left with the *States*. In Virginia, North Carolina, and Tennessee, the Representatives are chosen *after* the 4th of March. If membership commences at this time, the Representatives of those States must be excepted, or be members before they are chosen. And should the other States postpone their elections until after the 4th of March, which they have a right to do, this doctrine of a perpetual Congress would be subverted, and still the constitution and the liberties of the people would be safe.

But it is said that because, by the constitution and laws, Representatives are entitled to privileges before and after their sessions, this implies that they must be members while these privileges exist. This argument proves too much—Congress might be summoned to meet on the 4th of March. They must set out for the seat of Government, and would be exempt from arrest, before the former Congress expires. But they cannot be *members* while another Congress exists. They may, and generally do, hold their last session *until* the 4th of March, when their term expires. They are however, exempt from arrests during their *return*, but they are not members during that time. The truth is, that while going to *become* members, and returning after they have *ceased* to be members, they are entitled to this privilege. The same reason will apply when speaking of their right of franking letters, or any privileges granted by law.

But it is apprehended that a Representative would resign his office and take his seat, upon a *bargain* with the Executive that he should be reappointed. If this objection deserves a serious answer, it may be observed that this clause in the constitution, in its utmost extent, is no cure for the evil. *Before* the election, or *after* and *before the 4th of March*, the resignation would always be made under a promise of reappointment. Were we disposed to indulge in suspicion, we should have much more reason to fear a contract for a *new* appointment than a reappointment. But the constitution has provided against *neither*. To suppose it *possible*, would be a slander upon any Executive, and betray a jealousy totally unworthy a free and enlightened people.

The State constitutions afford a very good commentary upon the clause under consideration. The incompatibility is generally confined to the power of *acting*. In few instances it extends to *eligibility*, but in *none* to the precise time for which the person is elected.

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ting member.

By the constitution of Massachusetts, formed in 1780, executive and legislative powers cannot be *exercised* by the same *person*.

By that of Virginia, formed in 1776, the *exercise* of the powers of the different departments of the Government at the same time is prohibited.

By that of Delaware, of the same year, certain officers are made *ineligible* to either House, and members accepting of offices *vacate their seats*.

By that of New Jersey, of the same year, no person holding an office of profit, &c., shall be entitled to a seat in the General Assembly; but, on his being elected, and *taking his seat*, his *office* shall be vacated. There are instances which happened during the revolution, at a time when the corruptions of Parliament were deprecated and magnified.

Several of the State constitutions, adopted since that of the United States, have copied the words of that instrument in this particular.

By that of Georgia, however, the person holding an office shall not be allowed to *take his seat*.

By that of Tennessee, no person of the above description *shall have a seat*.

By that of Mississippi, laid on the table during this session, the prohibition commences with the *first session* after the election. With such expressions of the opinions and inclinations of the people before them, the framers of this constitution made the provision in question; and it seems impossible to doubt their intention to prohibit merely the exercise of the powers of the different departments of the Government by the *same person* at the *same time*.

Were this construction a novel one, and resisted by the uniform practice of this House, the propriety of urging this doctrine might be reasonably doubted. Had the indulgence of the practice proved dangerous to the independence of the House, or the liberties of the people, it would be our duty to correct it. But ever since the first organization of the Government, repeated instances of the kind have occurred, and those even stronger than that of the member objected to. Mr. Tracy, of Connecticut, while a Senator of Congress, was appointed by the President to the performance of some office relating to the Indians, the duties of which encroached upon the session of Congress, but he finished the duties, took, and retained his seat.

Mr. Dawson, a member from Virginia, between the first and second session of the Congress for which he was elect-

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ed, was appointed as a messenger to France. He performed the duties of his appointment, returned, and resumed and retained his seat.

Mr. Turner, of Massachusetts, claimed the seat occupied by Mr. Baylies. The House decided in his favor. He resigned the office of postmaster, and immediately took his seat.

Mr. Worthington and Mr. Morrow, Senators in Congress from Ohio, were, in 1812, appointed by the President to make a treaty with certain Indians in that State. They attended to the duties assigned, *after the 4th of March*, and returned, took, and retained their seats.

In nearly every Congress since the commencement of the Government, postmasters have been returned as members, and such members have almost uniformly held their offices after the 4th of March succeeding their election. Since the year 1800, are, among others, the following cases: Benjamin Tallmadge, Erastus Root, Matthew Lyon, Thomas Gholson, Samuel McKee, S. Dana, E. Wickes, and H. Tracy. When a Representative is fairly elected by the people, every doubt should weigh in his favor. Unless the construction of the constitution is *plainly* against him, he should retain his seat. But when the letter and the spirit of the constitution, and its rational and practical construction, are favorable, there seems no plausible reason why a member should be disturbed.

J. HOLMES.

Proceedings in  
Committee of  
the Whole  
House.

On the 19th of March, 1818, the report of the Committee of Elections being under consideration in a Committee of the Whole House, Mr. ADAMS, of Massachusetts, moved to disagree with the Committee of Elections, in the opinion expressed by them in the resolution with which their report concludes, and the merits of the report were discussed at great length, both on that day, and the following, by many members who took different sides in the debate.

On a division, there appeared in favor of the resolution of Mr. ADAMS, 67; against it, 66: so that the Committee of the Whole House *did not concur* in the report of the Committee of Elections, in the opinion that Mr. Herrick, was entitled to hold his seat.

The Committee of the Whole House having reported their disagreement with the Committee of Elections, the question was presented to the House, for ultimate decision. Some debate took place, touching the right of certain members to vote on the question, whose seats were supposed liable to be contested on the grounds involved in this controversy. The House, however, refused to excuse such gentlemen from voting; and, on the question being stated, "Will the House concur with the Committee of the Whole, in inserting the word *not* in the resolution of the Committee of Elections?"

It was determined in the negative ; Yeas 73 ; Nays 77.  
Those who voted in the affirmative, are,

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Mr. Abbot	Mr. Holmes, of Conn.	Mr. Sawyer
Adams	Hopkinson	Schuyler
Allen, of Mass.	Huntington	Sergeant
Anderson, of Ky.	Irving, of N. Y.	Seybert
Austin	Johnson, of Va.	Sherwood
Ball	Little	Simkins
Barbour, of Va.	Lowndes	Slocumb
Bateman	McLane	S. Smith
Bailey	Marr	Bal. Smith
Beecher	Mason, of R. I.	J. S. Smith
Bellinger	Middleton	Speed
Bennett	Jeremiah Nelson	Stewart, of N. C.
Burwell	H. Nelson	Terrell
Claiborne	Owen	Terry
Cook	Pawling	Tompkins
Crawford	Peter	Tucker, of Va.
Cushman	Pindall	Walker, of Ky.
Darlington	Pleasants	Wendover
Edwards	Reed	Westerlo
Ervin, of S. C.	Rhea	Whiteside
Floyd	Rice	Williams, of Conn.
Forney	Richards	Williams, of N. Y.
Forsyth	Robertson, of La.	Williams, of N. C.
Garnett	Ruggles	Wilson, of Mass.
Hogg		

Those who voted in the negative, are,

Mr. Allen, of Vt.	Mr. Herkimer	Mr. Poindexter
Anderson, of Pa.	Hitchcock	Porter
Baldwin	Holmes, of Mass.	Rich
Barber, of Ohio	Hubbard	Ringgold
Bassett	Hunter	Robertson, of Ky.
Bloomfield	Johnson, of Ky.	Sampson
Blount	Jones	Savage
Boden	Kinsey	Seudder
Boes	Kirtland	Settle
Butler	Lawyer	Shaw
Campbell	Linn	Silsbee
Claggett	Livermore	Southard
Cobb	W. P. Macclay	Spencer
Comstock	McCoy	Strong
Crafts	Marchand	Tallmadge
Cruger	Mason, of Mass.	Tarr
Culbreth	Merrill	Taylor
Desha	Moore	Townsend
Earle	Morton	Tyler
Ellicott	Moseley	Upham
Folger	Mumford	Walker, of N. C.
Gage	Murray	Wallace
Hale	New	Whitman
Hall, of Del.	Ogle	Wilkin
Harrison	Palmer	Wilson, of Pa.
Hasbrouck	Patterson	

Having by this vote *disagreed* to the amendment made by the Committee of the Whole, the House then, by a vote of 77 to 70, agreed to the resolution proposed by the Committee of Elections, and thereby confirmed Mr. Herrick in his seat.

That a high degree of importance was attached to this question, may be inferred from the fact of a call having been



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## CASE XLIII.

GEORGE MUMFORD, *of North Carolina.*

[The *formal* resignation of an office, held by a member elect, is not necessary, if the duties of it have so far ceased as to have operated a virtual abolition of the office.]

FEBRUARY 6, 1818.

The Committee of Elections, to which was referred a resolution of the House of Representatives of the 10th of December, 1817, and a message of the President of the United States, of the 29th of the same month, report :

Report of the  
Committee of  
Elections.

“ That in the year 1813, subsequent to the passage of the act for the assessment and collection of direct taxes and internal duties, George Mumford was appointed principal assessor of the tenth collection district of North Carolina ; that he accepted the said office, and executed the duties appertaining thereto, under the several acts afterwards passed, laying direct taxes upon the United States ; and that he has not resigned the said office.

“ In the month of August, 1817, he was elected a Representative of the said State ; and on the first day of the present session he was qualified, and took his seat in this House.

“ The act of July 22, 1813, under which Mr. Mumford held his appointment, was prospective and without limitation. No law then existed laying a direct tax. But as Congress intended resorting to that system of revenue, it was enacted ‘ that, for the purpose of assessing and collecting direct taxes,’ the United States should be divided into collection districts, and a principal assessor appointed for each district. If this act has neither expired nor been repealed, Mr. Mumford is still in office, and cannot rightfully be a member of this House. But by the second section of the act, to provide additional revenues for defraying the expenses of Government, and maintaining the public credit, by laying a direct tax upon the United States, and to provide for assessing and collecting the same, approved January 9, 1815, the said act was repealed, except so far as the same respected collection districts, internal duties, and the appointment and qualification of collectors and assessors ; in all which respects it was enacted that the said act should be and continue in force for the purposes of the last mentioned act. The act of 22d July, 1813, so far as the same was not repealed, was thereby limited to the duration of that act, and was continued in force only for its purposes. By that act a direct tax of six

millions of dollars was annually laid upon the United States, and apportioned agreeably to the provisions of the constitution. At the first session of the fourteenth Congress that act was modified, by repealing so much thereof as laid an annual tax of six millions, by reducing the same to three millions, and by limiting its continuance to one year ; and it was expressly enacted that all the provisions of the act of January 9, 1815, except so far as the same had been varied by subsequent acts, and except the first section thereof, (which related to the apportionment of the tax,) should be held to apply to the tax of three millions thereby laid. Thus the act of July, 1813, was again limited, and it was continued in force for the purposes of the three million tax, laid March 5, 1816. Whenever those purposes were fulfilled, that act expired, and of course all offices created by it ceased to exist.

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Elections.

“ By the letter of the Secretary of the Treasury, hereto annexed, enclosing a report of the Commissioner of the Revenue, it appears that the entire tax assessed in the tenth collection district of North Carolina, was accounted for previous to the 1st of December, 1817, and that no official duty then remained to be performed by Mr. Mumford, the principal assessor of that district. His said office, therefore, expired previous to his taking a seat in this House. The committee, therefore, respectfully submit the following resolution :

“ *Resolved*, That George Mumford is entitled to a seat in this House.”

This report, together with the following communication from George Mumford, was committed to the same Committee of the Whole to which is committed the report in Samuel Herrick's case.

*Mr. Mumford's communication to the Committee of Elections.*

To the Hon. JOHN W. TAYLOR,  
*Chairman of the Committee of Elections :*

SIR : Being about to defend myself against what appears to be a charge that implicates my honor and my character, I ask your attention whilst I make such an exposition as shall exonerate me from the imputation of having taken a seat in Congress, contrary to the constitution, or contrary to the principles of an honest man and a gentleman.

Mr. Mumford's  
defence.

Before I enter into the argument, I will briefly relate the facts as far as they are recollected. I was appointed principal assessor at the commencement of the system of direct taxation, and continued until its termination, which happened at the last session of Congress, previous to which term I had discharged all the duties assigned me by the law, and had settled all my accounts. I did not write a letter to any person saying that I had resigned the office, for it would at that time (whatever it might since) have been extremely ridi-

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lous, as the office had left me. Some time, however, in the spring, I received a letter from the Commissioner of the Revenue, written under the authority of the act of 3d of March last, which was calculated to clothe me with new power, so that any of the duties which might not have been finished, should be completed. I do not recollect having performed any duty after the receipt of that letter. The election at which I was chosen, was held on Thursday, the — of August: on the Thursday following, the sheriffs of the three counties, viz. Rowan, Randolph, and Chatham, composing the tenth district of North Carolina, met, declared me to be duly elected, and gave me their joint certificate to that effect. Early in October I left home for Portsmouth, in New Hampshire, and when on my way, I arrived in the city of Raleigh, and presented that certificate to the Governor, who, on receiving it, gave me a commission as a Representative, bearing date at *that* time. As I passed through this place, I intended to have remained here a few days, and meant to have called on the Commissioner of the Revenue, for the purpose of giving him all the information I could, relative to the probable business that might arise in the course of the completion of the collection by the collector. This visit was due from respect to an officer under whose direction I had served, and which, though not official, would have been proper, and which should have been paid, had it been in my power. Having remained at Portsmouth, out of my assessment district, during the intervening period, I returned to this place on the last day of November, and on Monday, the 1st of December, I appeared in the Representative hall, was qualified by taking the oath to support the constitution, and took my seat. When, as soon as the resolution inquiring what members held offices was adopted, I made a written communication of my circumstances to the chairman of the Committee of Elections.

This, sir, is the history. You will now please to indulge me while I make some remarks, and, in attending to them, you will be good enough to bear in mind, that the inquiry is, *whether I am a member of Congress or not; whether I am in the House or not*; a question so plain that it was not without some difficulty that I brought my mind into a train of reasoning to prove it. Indeed, if I had not so much at stake, and if it was not that the question, plain as it appears to me, seems to be doubted by them, or some of them, whose opinions I am bound to respect, and whose votes may be injurious to my rights, I should hardly trouble you to discuss the question. It is more than doubted, for it appears to be taken for granted, that, if a person holds an office up to the time of his qualification as a member, it would affect his seat; and it further appears to be taken for granted, that, if a person has held an office at any time since the 4th of March, or subsequent to his election as a Representative, it

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ought to affect his seat ; and that a person who has held an office, must write a letter to some one, saying that he resigns it, otherwise the omission would be considered a proof that he continued to hold the office, notwithstanding his qualification and taking his seat. I contend for the contrary of all these propositions, and hope I shall place them in so clear a point of view as to leave no doubt on your mind ; and, in doing so, will give you the plain words of the constitution, attaching to them the plainest and most obvious meaning of which they are susceptible. Be so good as to turn to it, and you will find that it is in the second clause of the second section of the first article, that the *qualifications* of a Representative are enumerated, viz. "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen ;" *and these are all that are enumerated as qualifications*. After going through with the House of Representatives, the constitution begins with the Senate, and, in the third clause of the third section of the same article, enumerates the *qualifications* of a Senator in these words, viz. "No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen ;" and these are all that are enumerated as qualifications of a Senator. After having thus mentioned, in express terms, the qualifications of each ; after having said what shall entitle a person to a seat as a Representative, and what a Senator ; after having gone through every thing relative to the person of each, until you get to the last clause of the sixth section, it then provides that "no Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person *holding* [continuing to hold] any office under the United States shall be a member of either House *during his continuance* in office." What, let me ask, was the object of this clause ? What did the people intend to guard against, when they spoke these words ? Let us inquire ; and we cannot do so as effectually in any other way, as by seeing what would have been our situation if this clause, or any part of it, had been omitted in the constitution. Suppose then that that whole clause had been omitted, what would have been the consequence ? Would there have been any thing to have prevented the same person from holding United States offices while he was a member, or being a member while he held such offices ? You must say not. Then may we not fairly conclude that that clause, *taken altogether*, was intended to pre-

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vent the occupancy of both at once: but suppose the latter part only, viz. "no person holding any office under the United States shall be a member of either House *during his continuance* in office:" suppose this had been omitted, what then would have been left that would have prevented a member from being appointed to, or from holding any office, except such as happened to have been created, or to have had their emoluments increased during the time for which he was elected? Surely nothing. Then may we not as fairly conclude that *this part* of the clause was *intended*, not to prevent the *appointment* of a member to an office, nor to prevent his *acceptance* of it; not to prevent the people from *choosing an officer* to be a member, nor to prevent his *acceptance and qualification as such*, but to provide that, although you may be appointed to an *old* office, although you may be elected to serve as a member, you shall not, *during your continuance* in office, be a member; you shall not, *during your continuance* as a member, be an officer? Now, sir, let us suppose that the *first part* of the clause only had been omitted, would there have been any thing to prevent a member from being appointed to a *new office* as well as he can *now* to an *old one*? As certainly not. This part of the clause was, therefore, intended to provide, not merely that a member should not hold a new office during the time he was a member, but that he should not *hold it at all during the time for which he was elected*. Indeed, sir, if the words that make the latter part of this clause, viz. "and no person *holding* any office under the United States shall be a member of either House *during his continuance* in office," had stood alone; if they had been intended to have contained *all the condition* that should have entitled a person to a seat, it would have been a forced construction, and not less forced than unreasonable and unjust to say that a person who had qualified and taken his seat as a member, ought to have it vacated, because he *had held* an office, without any proof or even a suggestion that he *was then holding it*; and especially after hearing him declare (as I do, and as I did to the committee) that he does not hold, or continue to hold, any office under the United States, and that he has not discharged any duties of any such office since his election as a Representative. Is it not indecorous, after a man has taken the oath to support the constitution, and thereby qualified himself, and taken his seat as a member, to insist that he *does hold an office*, which is as much as to say that he has violated the constitution and his oath, without having *some evidence* that he has discharged, or attempted or wished to discharge, other duties than those of a member? But, sir, these words, viz. "and no person," &c. &c. do not stand alone. They are not a part of a clause merely; they are a part of a sentence. They are included in a period with others, divided only by a semicolon. Their very situation

and connexion proves that they were not intended to contain the *only condition* or *any condition* which should entitle a person to a seat as a member; that having been provided for in the second clause of the second section, as before mentioned. The object of that clause must have been simply to declare that no officer should be a member, and of course that no member should be an officer, viz. that no person shall be both at once: this must have been the intent and meaning of that part of the clause, because, if the other meaning, viz. that no officer should be a member until he had formally resigned, had been intended, would not the convention, instead of putting them where they are, have added them to the second clause of the second section, thus, “no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen; and no person holding any office under the United States shall be a member of either House *during his continuance* in office;” and even then, sir, it would have been very ambiguous, leaving a doubt whether you must resign, or whether your acceptance of a subsequent appointment did not, in itself, vacate the office. Here it may not be improper to remark that a resignation, viz. a written communication, saying that you resign, is a thing that does not appear to have been contemplated as necessary, it not having been either described or prescribed.

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From all which, it seems to be clear that no person *holding* an office under the United States can be a member, and it is equally clear that no person *being a member* can hold an office. This will bring the question to what it ought to be, viz. whether a member does, by being appointed, and qualifying as an officer, vacate his seat; and whether an officer does, by being elected, returned, and qualified as a member, vacate his office; or, to reduce them to a single proposition, whether an officer or a member must *resign* the commission, office, or appointment which he holds, before he can be constitutionally authorized to discharge the duties of one which is subsequently conferred upon him.

If, sir, you will now suffer yourself to resort to common sense and common usage, (for here the constitution is silent,) I think you will find *that a resignation would in many cases be as unnecessary as it would be absurd*, and THAT IN ALL CASES WHEN A PERSON GOES FROM ONE APPOINTMENT TO ANOTHER UNDER THE SAME GENERAL AUTHORITY, IT IS NOT NECESSARY, though in many it is useful, and in all it is respectful. Leaving it to be necessary only in cases where the person wishes to withdraw from the authority under which he is acting, to place himself under *his own* or *that of another*, and then it is not necessary as a means of releasing himself from the employment, but that he may vacate it

Contents that  
the acceptance  
of one office is  
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quietly, that he may save himself from the sentence of a court. Is it not the universal practice and understanding relative to all offices and appointments, (which are incompatible,) *that the accepting the last, viz. the being constitutionally and legally initiated into the last, virtually dissolves or vacates the first?* Is there an exception, from a village council and constable to the Congress and President of the United States?

Suppose the United States, or the President and Senate, in the name and under its authority, was to appoint a member of the House of Representatives to be Secretary of War, could he not accept, qualify, and enter upon the duties of the War Department until he had either said or written to the House, or to the people of his district, or to somebody, that he resigned his seat? He might have been appointed *pro tem.* before Congress had assembled; could he not act as Secretary until the House met and received his resignation? Suppose the Legislature of North Carolina should choose a member of the House of Representatives as one of her Senators, would the Senate refuse to receive him as such until he had *proved* that he had said, or sung, or written a resignation of his seat there? Would they have stopped their proceedings, after having suffered him to take his seat, to inquire into such a fact? Does the constitution require it? Does common sense demand it? Suppose the House of Representatives had contended that, as he had not resigned, ~~he~~ *he* was still a member of that body, could a justification have been found in the constitution for an attempt to compel his attendance?

Suppose the people should elect a man who was a collector to be a Representative, would he, besides the *qualifications* enumerated in the constitution, be obliged to produce proof that he had resigned his collectorship? To whom must he resign? Do you say, to the Secretary of the Treasury? He did not appoint him. Must it be to the President, or the Senate, or to both? May it be sent by mail? It may miscarry. Who proves that you did not send it? And is the Secretary of the Treasury to send to the House of Representatives and claim his once subordinate, and take him from the high and important duties assigned him by his constituents, because forsooth a letter did not happen to get on safely? And does the House intend to expel a member, because it does not appear that he has written a few lines to the Secretary of the Treasury informing him of what it is his duty to know, and what he cannot help knowing, *viz.* that the person who *was collector is now a member*, and of course no longer a collector, the two being incompatible by the constitution, which he has sworn to support, and which it is supposed is before him? But suppose the people should choose one who had been a principal assessor, (I say had been;) one who had discharged the duties of his office as long as there were any to perform; one who had continued in that office as long as that office

had continued to exist under the laws prescribing the duties of the assessor, must he still be considered to be an assessor because a law was passed at a session subsequent to the termination of all his duties, authorizing the Secretary of the Treasury to give the assessors new and distinct powers? Must he still be considered an assessor notwithstanding he has told you in the oath he has taken, qualifying himself as a member, that he holds no office, civil or military, under the United States? Has he not told you so, and does he not now declare to you the same thing in writing? Must he still be considered an assessor, whether he agreed to act under this last direction or not, (to the performance of the duties of which there was no compensation allowed?) Surely not. Shall I take the liberty to refer you to the act appointing assessors, and the act renewing their authority? On reading them you will find that all the duties were performed—they were obliged to be performed previous to the commencement of the last session of Congress, if done agreeably to any law *then* existing.

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You will find, from the tenor of the law of the 3d of March last, that Congress acted under the impression that the power of the assessors and that of the Treasury Department had ceased, else why renew it? And having renewed it without affixing any compensation, was I bound to accept it—did I accept it? I say I did not; I performed no duty under it. And does not the very omission to perform the duties amount to a refusal to accept a new office?

But, sir, a resignation is necessary in some cases, as I have stated. A constable cannot fairly and quietly vacate his office by merely abstaining from the duties of it, or by refusing to act, nor can an assessor or any other officer; he must give *notice* to the authority that appointed him of his intention, or he will be liable to be sued. But suppose the same court who had appointed him constable should appoint him sheriff, what then? I say he must give notice of his intention to accept, and after acceptance and a regular initiation into the last office, the first *is vacant*; for where is the necessity of a resignation, that is, a notice that he intends to quit his constablenesship, *when that information is contained in the notice of acceptance of the sheriffalty*? A judge cannot leave the bench to accept an appointment given him by another authority, without resigning, viz. without giving notice: he must discharge the duties assigned him until he gives notice to the person or persons authorized to fill the vacancy, of his intention to withdraw; and he is liable if he does not, for otherwise it would be in his power not only to refuse justice, but to prevent any other person from being appointed to dispense it. But suppose the Legislature of a State was to elect one of its judges to be Governor, where would be the necessity of a resignation of his seat on the bench? If he came forward, and became qualified as Governor, all they

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would or could want to know would be whether he was Governor, and that, being before their faces, they would, as in duty bound, proceed to fill the vacancy on the bench. Suppose a Legislature were to elect one of the judges to be a Senator in Congress, it would, to be sure, be decorous for him to say *immediately* whether he intended to accept the Senatorship or not, that they might proceed, during their session, to fill the vacancy, but it is not an imperative duty; he may go through a summer's circuit, and appear in Congress hall on the first Monday of December afterwards, and take his seat. If he did not resign his seat on the bench, viz. *say that he accepted the Senatorship* to the Assembly, he could do so at any time to the Governor. If he did so while they were in session, they would fill the vacancy; if he did so to the Governor, he and his council would fill it *pro tem*. If he did not give this notice, he would be bound to perform the duty until he took his seat as Senator, and would be liable to be impeached if he refused or neglected to do so. Would the Senate, on his arrival, enter into an examination of his conduct? *Would they require any thing except an assurance that he was duly elected Senator, and that he came under the description of the third clause of the third section of the first article of the constitution?* They would not, for some of the States permit their State officers to be members of Congress, and some do not: it is a matter therefore that Congress have nothing to do with, and they would not trouble themselves to inquire into it. When a State officer has been elected, and *has taken his seat as a member of Congress*, his State is bound to know it, without notice from him by way of resignation; yet it often prevents difficulties, and is always respectful to give notice of your intentions; they cannot help knowing it, for he is, as to the office he held, politically dead.

Suppose an assessor wishes to retire from his office, he must resign; the Treasury Department must have notice of his intention, in order to provide that the public service shall not be injured, and the assessor would and ought to be liable in damages if he *left* his duty, the same as if he *neglected* it; but when the President and Senate have appointed him to a different and incompatible station, is not his acceptance of that a sufficient notice to the President that he is no longer an assessor, and would he not proceed to recommend another to fill the vacancy? Will any one contend that he would not or ought not until the assessor had resigned? Surely not. And is not the case much stronger when it is not merely the President and Senate (who are but servants of the people) that make the appointment, but the people themselves? Must the assessor go, or send, or write to some one of the other servants of the same master to ask *him* to permit the transaction? Is not the President bound to know and to provide for the vacancy in an office which

they have, before his face, made vacant, and made it his duty to fill? Do you suggest that he might not know it? Would not the Commissioner of the Revenue, when he saw the officer with whom he had been in the habit of transacting business, sitting as a member of Congress, know it? Would he know that the office was vacant if he saw the officer laying dead? and would that be plainer than seeing him sitting as a member of Congress? And are they not *equally* incompatible so long as we have *nature* and the *constitution* for our guide?

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Does the President, or the Secretary of State, or of the Treasury, or the Commissioner of the Revenue, recognise me as an assessor? Would they not frown indignantly on the man so lost to every sense of propriety and of virtue as to attempt to continue to hold an office under their absolute control, after he had taken the oath to support the constitution, and his seat as a member of Congress? *Would they not be equally guilty to suffer it?* Can they, now that I have taken my seat as a member of Congress, transact business with me *as an assessor*, without a violation of the oaths that they have taken? Would they not be liable to impeachment for continuing or attempting to continue a man in the execution of the duties of an office after that man had become a member of Congress? *Is not that one of the ways in which an UNDUE Executive influence could be exercised in this House?*

Besides, sir, in all cases where it is necessary that a resignation should be sent, it is equally necessary that it should be received, and *as important that it should be agreed to*, and all for the reason before given, viz. to enable the officer to retire quietly. But to contend for this proceeding in all cases, would put it completely in the power of the heads of departments, by refusing to accept, or by omitting to acknowledge the receipt of a resignation, to prevent any one who held an office from taking his seat as a member of Congress. Now, sir, will it be contended that the President, or the Secretary, or the Commissioner, (neither of whom pretends to recognise me as an assessor,) intended, by saying in their report "that no resignation had been received from Mr. Mumford," to fix upon him the stigma of having violated the constitution and his oath, and to deprive him of his reputation, and his constituents of the Representative of their choice? Impossible. If I am asked why the resolution required information "whether any offices were at that time (12th December) so held," and why, by the answer given, "that no resignation had been received from Mr. Mumford," it is left to be inferred that he is yet in office, I could answer that it would not have been proper for the President (or the Secretary of State) to have expressed an opinion as to Mr. Mumford's qualifications as a member: he had simply to state the facts, viz. that Mr. Mumford had been appointed to an office heretofore, and that no resignation had *been* receiv-

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*ed.* He could not, with propriety, say whether a resignation was or was not necessary, nor (*when the extent of the question is understood*) could it be expected that he would answer as to whether any of the members held offices at that time : no inference ought therefore to be drawn from the report on either of these points. Suppose, sir, that I had held an office after the 4th of March ; what then ? I was not elected as a Representative until August. But suppose that I had held an office up to the 1st of December, does it follow that I held it up to the 12th, and that *I continue to hold it now* ? Does *my having held* prove that *I do hold* ?

Do you ask when I became a member ? When does a man become a witness, or a juror, or a husband ? *Can they become so in an instant* ? Can you *make* a mathematical point ? Is a man married until the last ceremony is performed, yet has he not privileges as a bridegroom ; and have not witnesses, and jurors, and Representatives privileges also ? When does a quill become a pen ? Before you have put your knife to it, it is a quill ; at the instant it is nibbed, it is a pen, and not before.

But, after all, it may be asked, what great object of State policy is expected to result from knowing the offices, the time of appointment, of acceptance, and of resignation, by persons *who are now* members of Congress ? Some invidious person might suppose that it was intended that the few names on the list should be known and held up to public view as suspected of Executive influence. Some spiteful enemy might insist that it was intended that Mr. Mumford, (who was appointed, accepted, and served to the end in the unthankful and laborious office of principal assessor, and who, after having so served, had received, in his election to a seat in Congress, the reward due only to the faithful,) should be so held up. But, inasmuch as there is another way of vacating an office besides dying, resigning, and dismissing ; as there is such a thing as political death as to an office, without political disgrace ; and as the office which he *held* has become *vacant in that way*, it would seem to become the moral duty of those who have cast the odium to wipe it off. It may be said, however, that it was not intended or expected that he would have been touched in this business. Sir, I believe it ; I am convinced that he was not thought of when that resolution was introduced and passed, but the ill-natured will not be disposed to view it so favorably, which leaves it to be lamented that a stone should have been thrown in the dark. Only suppose, sir, that, instead of *looking back*, that resolution had *looked forward* ; and instead of asking the President to tell how many of the members he was secretly and unconstitutionally keeping in office, (for this is really the question,) it had been required of him to communicate whether any, and to which, of the members of the House of Representatives he had promised an appointment, designating the office,



the time promised, whether it was to be accepted, and how far a right to a seat was affected thereby, this stone would not have fallen on my head. Sir, the cautious had better look *forward* for danger than backward. Being convinced that it could not have been intended to charge me with a wrong, by a resolution in which I am not named, nor to find me guilty by a report *that does not say that I hold an office*, I shall rest my case here: indeed, sir, I believe I should have paid a better compliment to your understanding and to that of the House, if I had rested it in silence, and I should have done so, but that the language of the resolution, affecting to be the language of the House, made it my duty to treat it with more attention. Sir, I became a member of Congress on Monday, the 1st day of December; I have held no office, nor have I discharged the duties of any since, nor have I held or discharged the duties of any since I became officially informed of my election, and, as I possess all the qualifications prescribed by the constitution, I trust that you will so report.

Very respectfully, I am, sir, yours, &c.

GEORGE MUMFORD.

On the 21st March, 1818, Mr. DESHA reported the agreement of the Committee of the Whole to the resolutions contained in the said reports, to wit: 1818.  
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“Resolved, That Elias Earle is entitled to a seat in this House.” \* See ante, p. 314.  
Mr. Earle entitled to a seat.

“Resolved, That George Mumford is entitled to a seat in this House.” Mr. Mumford entitled to a seat.

The question was then severally taken to agree with the Committee of the Whole in their agreement to said resolutions, and passed in the affirmative.



## SIXTEENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. TAYLOR,  
WHITMAN,  
MERRILL,  
TARR,

Mr. BROWN,  
TUCKER,  
SLOAN.

### CASE XLIV.

ROLLIN C. MALLARY *vs.* ORSAMUS C. MERRILL, *of Vermont.*

[Where the presiding officer at an election, whose duty it was, by law, to return the votes, *sealed up*, made his return of them *unsealed*, they were, in the absence of any proof, or suspicion of fraud, allowed to be received.]

Where the statute prescribes the form of a certificate of the votes given, to be executed by such officer, he is not confined to the precise wording of the statutory form, but is deemed to have acted legally, if he conforms to its spirit.

If a presiding officer, by mistake, insert the wrong names in his return of persons voted for, the error may be corrected, especially if there is a record to amend by.

Votes fairly given to a party, may be counted in his favor, though they have never been returned to the proper State authorities, the default of a return not being chargeable upon such party.]

DECEMBER 9, 1819.

Petition presented and referred to the Committee of Elections.

On the 5th of January, 1820, the committee made the following report :

Report of the Committee of Elections. That the law of Vermont requires that, after the poll of the election shall be closed, and the result ascertained, a certificate of the number of votes given for each candidate, (of which a record shall be made in the town clerk's office,) signed by the presiding officer, shall be by him sealed up and superscribed, and shall be delivered to the Representative of the same or an adjoining town, who shall deliver it to a canvassing committee, to be chosen by the General Assembly. That the committee shall, on the Monday next following the second Thursday of October, sort and count such votes, and shall declare the six persons having the greatest number of votes, duly elected as Representatives to represent the State in the Congress of the United States, and shall give notice thereof to the chief magistrate of the

said State. The canvassing committee are required to make a list of the certificates by them considered legal, and also a list of such votes as are deemed illegal, and lodge a copy thereof with the clerk of the General Assembly, and the original certificates with the Secretary of State, to be by him preserved until after the first session of the Congress for which the election was held. The Governor is required to execute proper credentials to the persons declared to be elected agreeably to the said act.

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The election in that State for Representatives in the present Congress, was held by general ticket on the first Tuesday of September, 1818, under the said election law. Thirteen candidates were supported by the freemen at the said election. The canvassing committee, in executing the duty required of them by the act above mentioned, counted and allowed to the sitting member 6,954, and to the petitioner 6,878 votes. They rejected, of the votes returned for the sitting member, in the town of Wardsborough, 24, and in the town of Berlin, 59. They rejected, of the votes returned for the petitioner, in Fairhaven, 90, and in Plymouth, 42. These votes are claimed by the petitioner. He also claims to be allowed the following votes, which, from the copies of the town records laid before the committee, appear to have been given in his favor according to law, but which were not returned to the canvassing committee. In Woodbury, 56, and in Goshen, 27. If the votes in these four towns be added to the poll of the petitioner, it will give him 57 votes over the sitting member, even if the Wardsborough and Berlin votes be counted in his favor. The petitioner admits that these votes ought to be allowed to the sitting member; but no evidence of their legality has been submitted to the Committee of Elections.

Grounds of the  
petitioner's  
claim.

It is sufficiently proved that, in Fairhaven, Plymouth, Woodbury, and Goshen, the votes were given according to law, and certificates thereof were duly recorded in the town clerk's office of the several towns. But the presiding officer of the election in Fairhaven did not, as the law directs, seal up the certificate of votes after it had been recorded in the clerk's office, but sent it unsealed to the canvassing committee. For this cause it was by them rejected. No fraud is alleged, nor has the mistake done any injury to the sitting member. The town clerk's record is doubtless designed to guard against fraud. And it has not been the practice of the House of Representatives to allow votes legally given to be defeated by the mistake or negligence of a returning officer, especially in mere matter of form. The committee are of opinion that the votes of this town ought to be allowed to the petitioner.

Votes rejected  
by the canvassing  
committee  
because not  
sealed up.

The votes of Plymouth were rejected by the canvassing committee on account of the informality of the certificate of the presiding officer. It is in the following words:

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“ Votes for Representatives to Congress.

Mark Richards . . . . .	42 votes.
Rollin C. Mallary . . . . .	42
William Strong . . . . .	42
Charles Rich . . . . .	42
William A. Griswold . . . . .	42
John Peck . . . . .	42

At a freemen’s meeting legally warned, and holden in Plymouth on the first Tuesday of September, 1818, the above gentlemen were voted for Representatives to Congress. Plymouth, September, 1818.  
LEVI SLACK, *Constable.*  
MOSES PRIEST,  
*Town Clerk of Plymouth.”*

According to the statute, the certificate ought to have been thus :

“ At a freemen’s meeting legally warned, and holden at Plymouth on the first Tuesday of September, A. D. 1818, the votes for Representatives to Congress having been duly taken, sorted, and counted, the following persons had the number of votes annexed to their names, respectively :

Mark Richards . . . . .	42 votes.
Rollin C. Mallary . . . . .	42
William Strong . . . . .	42
Charles Rich . . . . .	42
William A. Griswold . . . . .	42
John Peck . . . . .	42

Given under my hand, at Plymouth, this first Tuesday of August, A. D. 1818.  
LEVI SLACK, *first Constable.”*

Literal compli-  
ance with forms  
not essential.

The Committee of Elections are of opinion that the form prescribed has been substantially adhered to, and that the votes ought to have been received and counted by the canvassing committee. It moreover appears that the town clerk’s record is strictly formal, and that Levi Slack was first constable. These votes, also, are to be added to the petitioner’s poll.

In the town of Woodbury, 56 votes were given for the petitioner, and a record thereof was duly made in the town clerk’s office, but in the certificate sent to the canvassing committee, through the mistake of the presiding officer, the names of Rollin C. Mallary and Charles Rich were omitted, and the names of Pliny Smith, Thomas Crawford, and Thomas Hammond, who were candidates for the office of councillors of the State of Vermont, but in whose favor not one vote was given for Representatives to Congress, were inserted. The committee are of opinion that the

error ought to be corrected, more especially as there exists a record, the verity of which is not impeached, by which the correction can be made.

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In Goshen, 27 votes were given for the petitioner, and 1 vote for the sitting member. The certificate of the election was made in due form, and recorded in the town clerk's office. The original was, according to law, delivered to the Representative of the town to the General Assembly, whose duty it was to deliver it to the canvassing committee. From some cause, which does not appear, he neglected to attend the General Assembly, and did not send it by a Representative of an adjoining town, because (as he alleges) such Representative left home for the General Assembly at an earlier day than usual. The certificate still remains in his possession. It is the opinion of the Committee of Elections, that the petitioner ought not to be deprived of the votes of this town, by reason of the circumstances above mentioned. The votes of Woodbury and Goshen are therefore added to the petitioner's poll.

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Committee of  
Elections.

Votes not re-  
turned.

The committee annex to this report a brief statement presented by the petitioner in support of his petition, marked A. Also an answer to the same, presented by the sitting member, marked B, and respectfully submit the following resolutions:

*Resolved*, That Orsamus C. Merrill is not entitled to a seat in this House.

*Resolved*, That Rollin C. Mallary is entitled to a seat in this House.

A.

### *Remarks of Petitioner.*

To the Hon. JOHN W. TAYLOR,

*Chairman of the Committee of Elections :*

The fifth section of the first article of the constitution of the United States, provides "that each House (of Congress) shall be the judge of the elections, returns, &c. of its own members."

It is respectfully considered that the term "*election*," in a political sense, must mean the *designation* or *choice* of a person to perform the duties of some office. An "*election*" is an act performed by freemen, possessing proper qualifications. The manner of performing it is immaterial, only as it may, or not, be sanctioned by some particular law. If by *viva voce*, when the declaration of the electors is made, the election is complete. If by ballots, when these are deposited by the people in the custody of the legal receiver, the designation is consummated. The electing power has then performed its office. The choice is perfect. All that follows is but the collection or preparation of evidence to ascertain the fact.

Petitioner's ar-  
gument.

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Argument of  
the petitioner.

The sorting, counting, and recording of the ballots by town officers, and the re-examination and computation by others, are but so many steps taken not to make or complete an election, but to discover in what manner it has terminated.

To judge of an election, therefore, must, of necessity, imply the right of taking cognizance of the exercise of the electing power; of this also, at the time when the designation is accomplished by the suffrages of the freemen.

The laws of individual States, from convenience or necessity, created a tribunal to determine for themselves, in the first instance, the election of Representatives. They have determined what shall be the evidence, and when produced. If no one is injured, no reason exists for a re-examination.

It is true that the laws of a State may be binding on Congress when supported by the constitution. That instrument has defined the limits of State power on this subject. It seems to be confined to the qualifications of electors, the times, places, and manner of holding elections. A State cannot prescribe to the House the rules of evidence, nor the time when that evidence shall be produced. It cannot declare that the report of a canvassing committee shall be conclusive in all cases whatsoever, nor the testimony on which it is founded, is all that may be used.

By the laws of Vermont, all the provisions for securing the evidence of an election are calculated solely for the State tribunal. The power of the House to interfere is not acknowledged. It would be unreasonable to say that the House should be bound by laws never intended to operate on its privileges; and if intended so to operate, must be nugatory. It cannot be inferred that, because the canvassing committee are required to receive the certificate of a town clerk or constable as evidence, Congress is to receive no other.

Again, each House shall be the judge of the election. How can this be done if the State authority has the power to create an intervening obstacle? How can the House judge of a fact which they are not allowed to examine? How are they capable of judging, if the errors and mistakes of every petty officer through whose hands the suffrages of the freemen must pass, are to be a perpetual bar to all knowledge of the original transaction? To have the right to judge of an election, and not be allowed to approach it; to be governed by the voice of the electors, and not be permitted to hear it, must appear deeply laden with inconsistency.

I have understood that a distinction is to be taken between the cases of votes *illegally* returned by the town officers, and on *that* account not allowed by the canvassing committee, and the cases where votes were given by the freemen, *and not returned at all*. The latter was the fact as relates to the

votes of Goshen and part of the votes of Woodbury. This is explained by the evidence. 1819.  
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It seems rational that a return, manifestly illegal, must be the same as no return at all. It appears difficult to discover a legal or equitable difference between a *neglect* to return the votes of the freemen, and a *return* so defective that no notice can be taken of it. Petitioner's argument, continued.

Hence, it is respectfully inferred that an *election* is complete when the electors have delivered their suffrages or ballots into the hands of the legal depository. That no mistakes or neglects of the agents of the freemen can alter or annihilate the fact. That no power exists, or can exist, to prevent the House from ascertaining that fact by such evidence as it may choose to admit.

A different construction would deprive that body of one of the most salutary restraints upon ignorance and corruption, and would rob the electors of the most effectual safeguard to their political rights. It would, in effect, be an admission that the honorable House must be composed of such as the officers of towns and counties should think proper to send, and not those whom the freemen, by their suffrages, had elected.

The proceedings in the State may always be considered, *prima facie*, correct. If no impeachment is offered, they need not be doubted.

But few decisions have come to my knowledge. All that may have an influence on the present case will readily present themselves to the minds of the honorable committee.

Permit me, however, respectfully to refer to the case of Willoughby and Smith, from the State of New York. The votes of the electors were given for "*Willoughby, junior*." A part were returned by the inspectors as having been given for "*Willoughby*." Smith was declared elected by the State authority. The House received evidence to prove for whom the votes were given by the freemen.

The name is *descriptio personæ*. The addition of *junior* describes another person, as different as Hammond from Mallary. To correct one requires no more power than the correction of the other. I make a reference to the evidence from Woodbury: Crawford, Smith, and Hammond, were returned to the canvassing committee by the officers of that town, in the room of Rich and Mallary. To the latter persons the votes of the people of that town were given.

I understand that the *qualifications* of freemen, at the time they appeared at the poll, have been after examined by the House. It is submitted whether this is not decidedly more independent of State authorities, a greater extension of the right of judging, than the simple allowance of the undisputed votes of the electors, which, by the negligence of their servants, had not been returned in season for computation.

It is said that, in 1804, a case from Georgia was decided,



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that seems to have some relation to the principle embraced in the present. A reference is made to that case in the report of the honorable Committee of Elections in 1817. By the laws of that State, the votes are to be returned within a given number of days. Some of the votes for one candidate were not returned within the limited time. The person, for whom a lesser number of votes were given, was declared elected. The votes given for the other, and not seasonably returned, were allowed by the House, and the person for whom they were given was admitted to his seat.

Should, therefore, the honorable House be pleased to inquire whether Mr. Merrill or your petitioner was elected by the freemen of Vermont, the following statement of facts, it is believed, will be supported by ample testimony :

The State of Vermont was entitled to six members. The election was by general ticket. The six who received the greatest number of votes were elected : Messrs. Richards, Rich, Crafts, Strong, and Meach, were chosen, to whom no opposition can be made. Mr. Merrill, the sixth, received the least number of votes of any one declared elected : his seat is the one contested.

The whole number of votes counted to Messrs. Merrill, Griswold, and Mallary, is as follows. From the state of the poll, these are the only persons concerned.

For Messrs. <i>Merrill, Griswold, Mallary.</i>			
	6,955	6,908	6,879
The votes given in the following towns were not counted, viz.			
Woodbury, . . . . .			56
Fairhaven, . . . . .		90	90
Goshen, . . . . .		27	27
Plymouth, . . . . .		42	42
	6,955	7,067	7,094

Which gives Mr. Mallary 27 votes over Mr. Griswold.  
It gives Mr. Mallary over Mr. Merrill, . . . 139 votes.  
It is said that Mr. Merrill lost in Berlin, 59  
Do. do. in Wardsborough, 24—83

Which leaves Mr. Mallary over Mr. Merrill, 56 votes, when all are counted, exclusive of the eight votes given Mr. Mallary in Mansfield.

The votes in Berlin and Wardsborough were undoubtedly given for Mr. Merrill, and he is entitled to their allowance.

The following is an abstract of the testimony :

1. The copy of canvass rolls. This shows the whole number of votes allowed to each candidate. It gives copies of the certificates from Fairhaven, Woodbury, Plymouth, and Mansfield. It shows that no votes were counted for Mr.

Mallary from Fairhaven, Plymouth, Woodbury, Goshen, and Mansfield.

2. In Woodbury, Richards, Mallary, Rich, Strong, Griswold, and Peck, each had 56 votes.

The officers in Woodbury, in making out the certificate, which was returned to the canvassing committee, omitted the names of *Rich* and *Mallary*, and returned, in the room of them, the names of "*Crawford, Smith, and Hammond*," for whom no votes were given.

Mr. *Griswold's* were returned and counted ; Mr. Mallary's were not. By the statement from the canvass rolls, it appears that Griswold had counted 29 votes more than Mallary. By allowing Mallary the 56 votes given for him in Woodbury, Mallary will have over Griswold 27 votes. Mr. Griswold's pretensions will then be set aside, as in all the other towns Mallary and Griswold had an equal number of votes. [Vide the depositions of Town and others, No. 4.]

The votes of Fairhaven were lost on account of the certificate of the votes being returned *not sealed*. [See the testimony of Gilbert and others, No. 5.]

The votes of Plymouth were rejected on account of an informal certificate. [See the depositions of Priest and others, No. 7.]

The votes of Goshen were not returned. [See depositions of Capen and others, No. 6.]

Notices were given by the magistrates of the time and place of taking testimony ; which are returned with the depositions.

I gave notice of my intention to contest the election, as by the letter forwarded with the evidence. I also wrote Mr. Merrill, desiring him to inform me at what time it would be most convenient for him to attend the taking of testimony. A copy of that letter is also transmitted.

All which is respectfully presented to the honorable committee.

R. C. MALLARY.

B.

*Reply of the sitting member.*

To the Hon. JOHN W. TAYLOR,

*Chairman of the Committee of Elections :*

To answer some principles assumed by Mr. Mallary in his remonstrance, and to abridge, if practicable, the inquiry commenced by him, in support of his claim to a seat in the House of Representatives in my stead, I solicit the indulgence of the committee to the following exposition of the claims, rights, and principles, I urge in defence.

It would seem, at the first impression, that it was alone necessary to bring the conflicting claims and the just rights of the freemen, summarily to the law of the State, and the practice and adjudications under it. Further reflection indicates the necessity of a more prolix and minute view of the

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case, and chiefly so, by reason of the positions assumed by my opponent, and the principles connected with it, and which are of first importance.

The question embraces the important rights of suffrage, and it takes, within its scope, the State laws, authorities, and sovereignty.

Comment upon the important and sacred character of the right of suffrage need not be indulged, as this is familiarly known, abundantly recognised, and clearly illustrated, in all our rules, codes of rights, and constitutions. Its value, its guards, its tenure, and the practical rules for the exercise of its power, are therein delineated with sufficient perspicuity and ability. However unnecessary it may be to enlarge upon this bearing of the case under consideration, I apprehend it is not only pertinent, but essential, to advert to it. It is equally as important to consider, that, from the quiet and pure character of the right of suffrage, contrasted with the turbulence, caprice, and passions of men, its exercise must, necessarily, be subject to such general and uniform rules of order as may be prescribed by the legislative power of the respective States, or of the Union. The constitution of the Union has so declared ; reserving to " the Congress," as the paramount power, the right, " by law, to alter the regulations of the respective States." " The Congress" refraining to do this, the State regulations are plenary, and must be sustained. The wise and experienced are, therefore, not at liberty to let it escape consideration, that the exercise of this right of sovereignty is not left a vagrant, capricious, or despotic act of power. In all well regulated communities, it must be a creature of law : and it is our pride and boast that this principle is recognised and protected. Our Government is emphatically a Government of laws, and not exactly a Government of precedents, which may be arbitrary, and shape an individual case. If the prescribed provisions of law are not strictly observed in this exercise of sovereignty, it is difficult to define the rules by which it is regulated and secured. It is apprehended to be a point established, that, in every legitimate exercise of the right of suffrage by the freemen, they are to yield obedience to existing ordinances and regulations, and cannot be supposed to act in their sovereign capacity, except they act in obedience to the express laws they have caused to be enacted. A perfect conformity to all the requirements would seem, therefore, essential to the consummation of the act of election. I also consider, that, while without the law, whether in their individual or corporate capacity, the freemen are estopped from claiming any right or privilege, nor can they confer any. Any non-conformity to the statute of elections by one portion of freemen, is never to be construed to impair the rights of another portion of freemen, who hold rights in consideration of their fidelity to the laws in such case made

and provided. *Imperfect rights* can never sustain competition with *perfect rights*.

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From this view of the principles bearing upon the case, I am persuaded that the depositing, assorting, and counting of the ballots rendered by the freemen, and the sealing up and returning the amount deposited, in the form, time, and manner expressly prescribed, to the ultimate State tribunal of decision, in order that the aggregate will of the freemen may be known, is imperatively required to consummate the act of election, and perfect a choice. The requisites of the statute of the State are guards placed around the sacred character of the elective right, to preserve its purity, and give to its exercise all the necessary protection and solemnities; are therefore to be considered parcel of it, and essential; and their particular application by the law and usages of Vermont, is by the freemen; and I dwell with much emphasis upon the fact, *it is their act*, as they select and appoint special agents, whose character and conduct they know, and in whom they repose especial confidence.

Reply of the  
sitting mem-  
ber, continued.

This settled order of business, touching elections, as prescribed by the respective States, it would seem, is obligatory on the decisions of the House of Representatives, regarding the elections of its members, unless "the Congress, by law, have altered such regulations." This conclusion is founded on the fourth section of the constitution of the Union; it is also founded on the broad basis of good sense, so far forth as it limits discretion, and the range of decisions, to the system of rules prescribed in the law of each respective State. It shields, also, from the imputation of caprice and irregularity, the exercise of the right of suffrage, the manifestations of the will of the freemen, and the decisions of the representative body of the nation: and, inasmuch as the law of the State is not in derogation of the constitution, or any law of the Union, but pursuant to the constitution, I feel much confidence that the statute of the State, the practices of the freemen, and the official expositions and decisions under it, will be respected.

That I may not be misunderstood, I ask leave to remark that, under a case of impeachment of State proceedings, the power of the House, and the duty of its committee, I apprehend is to inquire whether, in all the stages of proceedings, the constitution of the Union, and the State regulations as to time, place, and mode of proceedings, have been observed; and if, in the investigation, it is found the State regulations are agreeably to the constitution, and the requisites of the law have been regarded, the proceedings of the freemen and decisions of the State tribunals are in good faith to be recognised and accredited; otherwise the State law is an act of supererogation, and a nullity. Hence I admitted the persuasion; that the House of Representatives would never assume a power which can only be exercised by the Congress,

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and, therefore, the State laws and proceedings would be adjudged *plenary*, except previously *modified by a law of Congress*; and that, on the contrary, if the law is in derogation of the constitution, or the proceedings are not pursuant to the statute, or provided the agents of the freemen have been fraudulent, or the tribunals of decision have been perverse and corrupt, then, indeed, the procedure is nugatory, and will be so declared; then the power of the House will be found remedial, and sufficiently ample.

As a regard to the will and prerogatives of the freemen, and a tender care of their interests, is ever a paramount inclination and duty with a faithful Representative; and as this case may seem to involve their rights and interests, and a mistake in reasoning on this case may happen, whereby their just rights may, in fact, be sacrificed, I would inquire, for whom is this investigation instituted? Not for the freemen. They have no petition here; their rights are not implicated; they do not feel injured. I repeat, the freemen of Vermont have preferred no claim; and yet, as Representatives, it becomes the House and its committee to cherish the rights of those freemen who have been industrious and faithful to their own rights, and who, by their diligence, have shown fidelity to the law. I repeat, they ask no other intervention; they have taken no step; they care not. The law is the guardian of their rights, and they know it; and they ask no other exercise of guardianship here. The freemen of Vermont are also aware that vigilance is their only safeguard, the title-deed of their immunities. They ask not for the *few* who have not been industrious and faithful to their rights; they ask not that the beneficial and liberal system of legislative wisdom and providence should be made a sacrifice on the unhallowed altar of indolence and indifference, or that the consummated rights of the faithful should be immolated.

I beg leave to say, had I respected the rights of the freemen less, or had I been less sensible of the paramount motives which influence honorable members, I should have withheld reiterations of these facts; I should have contented myself with saying the freemen are not injured. Decide as members may, the freemen of Vermont have their full representation; the freemen of the Union are not injured, for Vermont has but its due proportion of representation.

Who are these petty town and county officers, whom my opponent speaks of as giving members to this House? They are the fathers and guardians of the freemen's interests; the choice men of each corporation; selected, yes, approved and appointed by the freemen themselves, as their legal and respected depositaries, and their agents to perform and fulfil for them the law, that not one jot or tittle thereof fail of its accomplishment; their acts are the acts of the freemen. This question should be stripped of all bias for the freemen, except to sustain the institutions which define and regulate

their immunities. By whom is it asked that State regulations should be disregarded? Certainly not by the freemen. Such as have neglected the legal modes and certainties, and abandoned their rights which the law sustains, would have been estopped, by reason of their own laches, from asking the prostration or suspension of a State system; for the favor of law is not towards them.

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ber, continued.

I beg leave to ask, of whom is the destruction of a State system required? The constitution and law of the Union are not asked; but it is asked of a branch of Congress, the people's Representatives. And shall one branch of the law-making power do it, under the arbitrary doctrine of precedent alone? No. Ours is a Government of express laws. Adjudicated precedents of practice are, not unfrequently, beneficial, and perfect the provident work of a Legislature, and, in all cases of doubt and ambiguity, they rather lean to prop freemen's diligence and fidelity. For any individual, then, should "shame light" upon a *system* established by a State sovereignty? The answer is to the case and in point. The case is a case of strict right between individuals.

In this view of the subject, I proceed to remind the committee of my opponent's remark, that "the proceedings in the State may always be considered *prima facie* correct." The proceedings in a State, done fairly, and conformably to law, in my opinion, are more than *prima facie* correct; they are as record evidence, which cannot be contradicted or altered by parol testimony. *Neglect* or *mistake* may defeat the rights of the freemen, by reason of not perfecting the evidence of a fact, or the legal manifestation of their will. The plea of *neglect*, or *mistake*, cannot be urged to contradict, vary, or destroy a legal proceeding, nor defeat a legal and vested right. State proceedings may be *destroyed*, by showing there was *corruption*. Actual fraud, or corruption, in any stage of the proceedings, and in whatever shape it satisfactorily appears, eradicates an otherwise consummated right; because it determines it *no record, no act*. I urge these doctrines the more strenuously, because the case under consideration is a question of strict right between two individuals. My opponent does not allege corruption, nor prove fraud; his parol testimony therefore is inadmissible, and altogether insufficient to impeach legal State proceedings, and my rights, which are sanctioned by the highest tribunal thereof, and consummated by the signature of the Chief Magistrate and the seal of the State. I consider my right to a seat in the House of Representatives identified with the rights of the greatest number of diligent freemen, with the law, and the decisions of the State authorities.

I contend, for yet other reasons, that the statute of Vermont is to be in force, and its requirements to be held inviolate. Deducible from it are the soundest rules of evidence; the best of which the case is susceptible. I hold on to this



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ber, continued.

ground with the more confidence, because, in so doing, I conform to the decisions of the last and final tribunals of the State—I mean the tribunal of canvass, and the Representatives of the State in General Assembly, to whom the committee of canvass report. Here it was solemnly and explicitly decided by actual vote, after due debate and deliberation, that the votes of the freemen in any incorporated town, *wanting in any of the requirements of the law, must be deemed illegal, and be rejected.* Comment is probably unnecessary, yet I trust I shall be indulged in remarking, it is an acknowledged principle that the *will* of the freemen, unaccompanied by any *act*, cannot consummate a *choice*, because there can be no manifestation of their *will*. In towns where the choice is to be determined by ballot, the will of no individual freeman can be accounted any thing, except he makes deposit of his vote in the ballot box, for canvass, at the legal time and place. And in order that the aggregate vote of the freemen may be manifested, every political corporation must make deposit of the amount of its votes at the legal place, to the appointed board, and in legal time. As, in the first instance, the ballot deposit is the highest possible manifestation of the will of the individual freeman, precisely in the same manner, in the second instance, the deposit is the highest and most solemn manifestation of the aggregate will of the freemen of the State. The portion omitting to do this prescribed *act* have *abandoned* their rights, and, by their own *laches*, have rendered their rights imperfect and inchoate, and the power of reclaiming or perfecting them is lost.

Before I proceed to an examination of the precedents quoted by my opponent, I respectfully ask leave to urge that the use of precedents arrayed against the check usages, or precautionary ordinances of States, is only to be justified on an extraordinary occasion. They are to be used with great caution and the soundest discretion, at all times, and are never to be adopted to destroy legal certainty, or to extend the consummation of an act beyond the statute period of conclusion. Even the sovereign power of Congress has its limitations, and an integral portion of that authority has its restraints. I hold it correct in principle, that, until the constitution shall have been modified, or until the Congress shall have altered, by law, the State election regulations, and made a uniform course of practice, the decisions touching elections cannot be uniform, but must be graduated to the varying and peculiar regulations of each State respectively. The requisites of return, &c. prescribed in the law of Vermont, were suggested by practical abuses, or well-founded apprehensions of imposition on the fair rights and will of the freemen, and were intended as checks and adequate guards against their recurrence and existence. The like evils may only sectionally occur, and the like apprehensions may arise

from causes purely local. The like remedies and precautions will not, therefore, generally demand legislative interposition. And to break down provisions of this character by the power of precedents, adopted under other circumstances, cannot be friendly to the dearest rights of freemen.

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ber, continued.

The uniform principles of decision in the New England States, as I have been informed by honorable gentlemen, have been strictly with their laws. And if the laws and decisions of States are to be held as of no weight and nugatory, I am of opinion the safer course is for "the Congress" to alter the State regulations by *law*, and that the altering or nullifying them by mere precedents is questionable and rarely to be tolerated.

Inasmuch as precedents of this character are alleged, by my opponent, to exist, I proceed to examine them. The detailed report of cases, with all the facts and reasons governing the precedent, are necessary to find its analogy and relationship to the case in consideration. The cited case of Georgia is an entirely different case. The reasons for non-compliance with the law regarding returns, was not urged as a laches of the freemen, but was a providential prohibition. The maxim that the "act of God injures no man," in this case has all its force, and is not to be disputed; the decision was correct. It can have no bearing in the present case, which was an *abandonment* by the freemen of their legal rights, as, in the case of the town of Goshen, they neglected to make return, not only within the legal period, but even to this day. And in the towns of Fairhaven, Plymouth, and Mansfield, the case was determined against them, under solemn adjudication, by reason of their *own acts*. They did not obey the law, by reason of indolence, or a want of diligence, neither of which is a competent plea to delay or change the operation of law, or to arrest and subvert its commandments. The case of Georgia, by an examination of it in its details, shows that the returning officer is admitted to have made use of all due diligence. And the allegation was, that, by reason of an unusual and tremendous storm, or hurricane, by which the country was inundated, bridges were swept away, and the ways were rendered impassable, he was prevented by this act of God from fulfilling the law. There is, therefore, no similitude in the cases, and the precedent does not apply, and, in fact, is no precedent; it is a solitary case. The *fact* to be decided was as to the *admission of proof* of the alleged act of providential prohibition, regarding return. So far as regarded this point, it may be received, and stand as an unsettled, solitary precedent. Inferences, remarks, or decisions, beyond the point in issue, or submission, are extra-judicial and without the case, and cannot be drawn in as precedent. This I judge to be a distinction correct in principle, and warranted by practice. The present case was a non-observance of law, without any alleged pro-

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vidential excuse ; it was an essential legal *laches* of the free-  
men—the *fact* is acknowledged by my opponent, that the  
*law* was not complied with. The decision called for was, I  
repeat, as to evidence regarding the cause of failure, and  
they decided not to “receive any evidence on that point ;”  
all besides is to be considered argument. It might be logic  
in that peculiar case. There is, however, an important  
distinction in that from the present case which I have men-  
tioned. The doctrines of precedent should never set statutes  
at defiance, and bring into contempt the acts of a Legislature ;  
they are to be taken in their most strict sense, and are never  
to abolish express, fixed, constitutional law. The doctrine  
of precedent, in any other view, is perilous and dangerous  
in the extreme. It “assumes power without control, on the  
spur of the occasion, and after the fact, and makes its decision  
the *law* and the *judgment*.” If there is “fixed law,” it must  
be followed : if there is no law, “the judgment on any par-  
ticular case is the law of that single case only, and dies with  
it.” And this is more emphatically a sound principle, under  
our Government.

The extra-judicial remarks in the cited precedent case are  
of such dangerous measure as to place States in a humiliating  
predicament. The freemen, in their sovereign capacity,  
pursue duties and perform acts, agreeably to their laws, which  
they enacted as barriers of safety, and within which they  
reposed in confidence. Yet, after all, a precedent never  
promulgated can sink its character and importance ; destroy,  
by a touch, the main-spring of its power, and dissolve all its  
sanctions and securities. It is a predicament which exhibits  
a most unnatural state of things ; as the only power, compe-  
tent to create a new power, is the “Congress,” and they  
may do it by *law*. In the present case I desire it may not  
be forgotten that the return is the *act* of the freemen, and  
the omission of return by any portion is their own *laches*, as  
the returning agent is a creature of their own appointment,  
and his legal neglect concludes a forfeiture.

*Ante*, p. 234.

The case from Massachusetts, of Baylies and Turner,  
named by an honorable member of the committee, regard-  
ing the addition or omission of “junior,” is a case, in my  
apprehension, distinctly marked as inapplicable. The free-  
men, in that case, felt aggrieved, and they petitioned. In the  
investigation of the case in which this decision was had, it  
was found that Turner, senior, lived out of the district, and  
was ineligible by the law, and as *dead* ; and therefore the  
freemen are not to be supposed to vote for a person dead in  
law, or naturally dead. I believe it is a settled principle in  
judicial proceedings, that the affixing or omitting the appel-  
lation of “jun.” may be sufficiently *certain* ; and it becomes  
a *fact* to be inquired into, whether the person be well de-  
signated and known by either description, as well by one  
name as the other ; and I consider, in a case of ineligibility,

or actual death, the fact is clearly ascertained. The cases of "jun." are a matter of *fact*, and may be inquired into, and are not to be measured by the same rule as *legal laches*, which produces a forfeiture. It is to be judged of according to the best evidence produced. And, in my judgment, the distinction is palpable between this class of cases and the present case, where in the *original return* an entirely distinct name is entered. Mallory and Hammond, in no case, can come under one and the same description of person, or be understood, under any circumstances less than legislative interference which may give a new name, as designating one and the same person. The case of Woodbury, by my opponent, was brought to this class of precedents; the cases are not analogous, for the reasons assigned. If we pass to the evidence which my opponent has produced, we shall find that the settled rules of evidence, in constant practice in our courts, invalidate his evidence. The original officially sealed certificate returned is the declared and best evidence, and made so by express law. And this evidence, by my opponent's exhibit, shows no such *fact* as his having received any vote in the town of Woodbury. The copy record of a town is, by no means, equal evidence. The case appears to me analogous to the case of a deed of conveyance; for instance, the original and sealed deed conveys 200 acres of land, the *copy* of it spread upon the record puts down the amount conveyed at 100 acres; I apprehend no legal doubt could be raised on a question made, which ought to have the precedence, and which is the highest and best evidence, the *original* or the *copy*. The statute in section six, in my view, intimates that the Legislature had the same view. They not only made the sealed, original certificate, done in statute form, the legal evidence in the previous sections, but in the cited section they direct "that the committee appointed by the General Assembly, for the purposes mentioned in the act," "shall preserve and lodge the *original certificates* with the Secretary of State, until after the first session of Congress for which the said election is held."

The guards and provisions of the act of the Legislature of Vermont are to be regarded as so many admonitions of the fallibility of human conduct and testimony, and are, therefore, to be held as a definitive standard, whereby are to be ascertained the highest and only legal manifestation and expression of the will of the freemen. I, therefore, feel constrained to repeat that the original certificate made out and sealed in the presence of the meeting of freemen, and returned to the tribunal of aggregate canvass, and which is sustained by all the prescribed legal forms and official solemnities, is the *best* evidence. And that the copy of the record of the town of Woodbury, and the affidavits procured and adduced by my opponent to contradict the original certificate, to make the most of them,

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ber, continued.

are as objectionable and uncertain; and their admission to even an equality would be a disregard of settled principle, unlawful, and dangerous in practice. Indeed, it is unsafe to forget that the treacheries of memory, and the perverse motives which too often actuate human conduct, are usually more multiplied after the general result is known in defeat, and revived by contest, than they are at the consummation of a fact happening before the case is made out. And, besides, any adjudication under the circumstances of the case, and after the fact, repudiating statute evidence, would, in its character and consequences, be *ex post facto*.

The petitioner nor the sitting member is to be put in contest with express law, nor can they be injured by the fair and full operation of the law of election. By this only can either be entitled to the honor of a seat as a member on the floor of Congress; and they ought not only to disclaim, but disdain to occupy a seat on any other tenure.

The freemen are not injured by the law. The question, so far as regards them, is this: Shall a majority of the freemen, who have regarded the integrity of their rights, been diligent in their duty, and obedient to law, prevail? Or, shall that portion of freemen prevail, who, like the unwise virgins, did not trim their lamps, who neglected their rights and duties, and who were unfaithful to the law?

Mr. Mallary, who instituted the present contest, received a less number of the legal votes of the freemen of Vermont than did either of the sitting members from that State; and I declare this in all soberness, under the authority of express law, and by virtue of the sanction of the legal State authorities, who have so declared the law and the fact; and I do it more boldly, as collusion or fraud is not alleged in any stage of the proceedings.

The habits of the freemen, by usage, are in conformity to the law; they have decided for the law, and, in practice, they have observed it in its strictness, except the small number of from two to three hundred. The agents of the freemen, and the tribunals of the law, have decided for it. The constitution of the Union authorizes it, and, from an imperative sense of duty to the freemen, to the law, and the State authorities, and to the constitution of the Union, I solicit the representative branch of Congress and its committee to confirm the law of the State, and every and all its provisions, guards, and solemnities, according to the long settled judicial usages of construction, and the rules of evidence. Nor can I doubt it. Detection of frauds upon the law, and impositions upon the freemen, will receive rebuke. A prodigal use of power will not be sanctioned any where.

I, therefore, would move the committee to view the case in the following order, and make their decision accordingly. The facts and statement of my opponent justify this classification of the points in contest, viz.



1st. Ought the adjudications of the State legislative tribunals of canvass to be overruled, and their decisions to be reversed, which were made in conformity to the law and the usages of the States, and in all verity and good faith?

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This point involves the towns of Fairhaven, Plymouth, and Mansfield, whose votes my opponent claims.

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ber, continued.

The attention of the committee is respectfully called to the law of the State, entitled "An act for electing Representatives to the Congress of the United States, and directing the mode of their election." The policy and provisions thereof are easy to be understood; and the decisions were conformed to the letter and spirit of the law.

2d. Can the votes of Goshen be adjudged legal, and ought they, upon any principle, to be counted for the petitioner?

The votes of this town were not returned at the legal period, nor have they been returned to the present day; there is, therefore, no legal evidence of any votes having been given at all by the freemen of said town of Goshen. The original certificate has not been exhibited, nor is it believed there is any precedent or any decision relative to this case.

3d. Is the petitioner's claim to the count of votes said to be given in the town of Woodbury, substantiated by the best evidence? And ought the said votes, claimed to be given for my opponent, on the evidence exhibited, to be taken down in the estimate of votes to be made here to defeat my rights? And is the statute evidence, the original official return of the returning officer, repudiated?

I cannot allow myself for a moment to entertain an idea that the House of Representatives, or its committee, will so decide as virtually to repeal or render nugatory the cautious and prudent enactments, the express law of a State sovereignty, or the deliberate decisions of its authorities; or that the plainest and most settled rules of construction and evidence will be prostrated; or that these guaranties of the freemen will become as lodgers or exiles in the metropolis. The present period, marked by the absence of political asperity and party prejudices, is perhaps a favorable period to *alter by law* the election regulation of States, and to substitute a uniform system. This, however, is a different consideration, and only advanced at this time in allusion to arguments before suggested, touching power.

It is a remark frequently made, that precedents are not necessarily, and ought rarely to be binding on a legislative body. The views taken of a subject may be different; motives extraneous may bias the judgment, and give to it erroneous tendencies. The times through which we have just passed, I think, gives additional force to the remark, and induces the necessity of caution and technical nicety in their admission, if admitted at all, to justify a contested and



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are as objectionable and uncertain; and their admission to even an equality would be a disregard of settled principle, unlawful, and dangerous in practice. Indeed, it is unsafe to forget that the treacheries of memory, and the perverse motives which too often actuate human conduct, are usually more multiplied after the general result is known in defeat, and revived by contest, than they are at the consummation of a fact happening before the case is made out. And, besides, any adjudication under the circumstances of the case, and after the fact, repudiating statute evidence, would, in its character and consequences, be *ex post facto*.

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Mr. Mallary, who instituted the present contest, received a less number of the legal votes of the freemen of Vermont than did either of the sitting members from that State; and I declare this in all soberness, under the authority of express law, and by virtue of the sanction of the legal State authorities, who have so declared the law and the fact; and I do it more boldly, as collusion or fraud is not alleged in any stage of the proceedings.

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I, therefore, would move the committee to view the case in the following order, and make their decision accordingly. The facts and statement of my opponent justify this classification of the points in contest, viz.

of two constructions, by several professional members of the committee. Inquiry was, therefore, gone into, to ascertain the practical definition or exposition of the law by the State of Virginia; and when that was satisfactorily found, the decisions of the committee took the same direction.

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ber, continued.

I, therefore, for my constituents, protest against the relevancy and authority of inference and remarks made extra-judicially, and extraneous of the point strictly in issue, and the more especially when they tend to nullify State laws, repudiate State practice, and consequently draw after them unlicensed and dangerous power.

If, however, it is deemed correct that decisions made here, under any circumstances, are paramount law, wherefore are they not promulgated? And the mode and reasons which gave them being and power should have equal publicity. It should be generally known whether they passed after solemn argument, and profound investigation, or whether silently, and without question. States, then, might modify or repeal their laws altogether, and "the Congress" might direct that original votes be received and returned without the mediation of State authorities, as a course less humiliating to State sovereignties, and for both, more dignified than a conflict between written and unwritten law.

I make no pretensions to legal precision; still I feel a degree of confidence that members having legal acuteness will recognise the distinctions to which I have alluded.

I have treated the subject as I honestly view it, and as involving policy, principles, and interests, of more than individual concern, chiefly in consequence of doctrines assumed by my opponent, possibly by the loose manner of putting down precedents he has urged, and the danger of their extension or progression in application beyond points not definitively in issue, under the original reported case.

I respectfully submit for consideration my views of the case, and the case itself.

O. C. MERRILL.

The preceding report of the committee, and statements of the parties, being before the Committee of the Whole House on the 11th of January, 1820, Mr. WHITMAN, of Massachusetts, opposed the report at length, and argued in favor of the right of the sitting member. After which, Mr. Mallary, who had been assigned a seat in the House during the discussion, rose, and occupied the House with a speech of upwards of one hour in length, maintaining his right to the seat in question, when an adjournment took place.

Proceedings in  
the House on  
the report of  
the committee.

On the day following, Mr. Merrill, the sitting member, presented a memorial to the House, stating his belief that he could, if allowed time, prove certain facts therein stated, tending to establish his right to retain his seat, and praying

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that further time might be allowed him to take evidence in support of those facts. His memorial was, however, ordered to lie on the table.

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the committee.

A motion to refer the report, together with this memorial, again to the Committee of Elections, was negatived.

Mr. RANDOLPH spoke a short time to vindicate the decision of the House in 1804, in the case of the contested election between Mr. Spaulding and Mr. Mead, (which had been cited in the present case,) in order to show that there was no analogy between that and the present case. He was replied to by Mr. TAYLOR, who argued that such analogy did exist in a strong degree, and that the decisions in both cases should properly be the same.

The report of the committee was also supported by Mr. HOLMES, Mr. GROSS, and Mr. HEMPHILL, and opposed by Mr. STORRS, Mr. BROWN, and Mr. WHITMAN; the latter of whom moved that the report be so amended as to reverse it.

Petitioner de-  
clared entitled  
to his seat.

On the 12th, the Committee of the Whole House reported their agreement to the resolutions of the Committee of Elections, declaring that Mr. Merrill was *not* entitled to his seat, and that Mr. Mallary was entitled to it; the latter of which resolutions was passed January 13, by a vote of 116 to 47, and Mr. Mallary was accordingly admitted to a seat in the House.

## CASE XLV.

JAMES GUYON vs. EBENEZER SAGE, *of New York.*

[A mistake in the inspector's return, omitting the word "junior" where it ought to have been inserted, may be corrected in the House.]

DECEMBER 10, 1819.

Petition presented, and referred to the Committee of Elections.

January 12, 1820, the committee made report:

Report of the  
Committee of  
Elections.

That the first congressional district of the said State is composed of the counties of Richmond, Kings, Queens, Suffolk, and the first and second wards of the city of New York, and is entitled to elect two Representatives. That, at the late election for members of this House, Ebenezer Sage, James Guyon, *junior*, Silas Wood, and John Garretson were the only candidates: 2,171 votes were returned for Silas Wood, 2,085 for Ebenezer Sage, 1,992 for John Garretson, 1,701 for James Guyon, *junior*, and 396 for James Guyon. From the affidavits of Abraham Crocheron, Richard Crocheron, and John Hillyer, inspectors of the said election of the town of Northfield, in the county of Rich-

mond; of John Doughty, John C. Freeks, Jeduthan Johnson, Noah Waterbury, and Abraham Remsen, inspectors of the said election of the town of Brooklyn, in the county of Kings; of Edward A. Clowes, Thomas Tredwell, William Everitt, and John D. Hicks, inspectors of the said election of the town of Hempstead, in the county of Queens; and of Jacobus Montfoort, Micah Townsend, Jarvis Frost, and Daniel Youngs, inspectors of the said election of the town of Oyster Bay, in the same county, it appears that, in the said towns, 391 votes were, through the mistake of the said inspectors, returned for James Guyon, which in truth and fact were given for James Guyon, *junior*, and ought to have been so returned: these votes, added to the poll of James Guyon, junior, give him a majority of 7 votes over Ebenezer Sage, the returned member. Mr. Sage has admitted the receipt of copies of the affidavits aforesaid, and has not controverted the truth of the matters therein contained. He has hitherto omitted to appear and claim his seat, and no evidence has been adduced of his intention to make such claim. The committee therefore submit the following resolutions:

**“Resolved,** That Ebenezer Sage is not entitled to a seat in this House.

**“Resolved,** That James Guyon, junior, is entitled to a seat in this House.”

*Testimony submitted with the report.*

The subscribers certify that they were inspectors of the election held in the town of Brooklyn, in Kings county, on the 28th, 29th, and 30th days of April, in the year 1818, for the purpose of electing Representatives to Congress for the first congressional district of the State of New York.

At the said election Ebenezer Sage, Silas Wood, John Garretson, and James Guyon, junior, were candidates; and that we, the said inspectors, did canvass and estimate the votes given at said election, and made out certificates of such canvassing, and filed the same in the clerk's office of the county and town aforesaid; from which certificates it appears that 183 ballots were estimated as the number of votes given for James Guyon, which the subscribers verily believe was an error made by them in making out their certificates, and that the said number of 183 votes were given by the electors of said town for James Guyon, *junior*, and ought to have been estimated and certified by us as the number of votes given for that gentleman. Brooklyn, 24th November, 1819.

JOHN DOUGHTY.

JN. FREEK.

JERM. JOHNSON.

NOAH WATERBURY.

ABRM. A. REMSEN.

WILLIAM SHENK,

*One of the clerks at the election.*

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Evidence sub-  
mitted with the  
report.

The persons who have subscribed the foregoing certificate have severally sworn that they believe the matter therein stated to be true. Sworn before me, this 24th day of November, 1819.

ISAAC NICHOLS,  
*Justice of the Peace.*

This may certify that, on or about the 20th of the month of December, I received from James Guyon, junior, a copy of the within certificates, perfectly according with the same. Sag Harbor, January 3, 1820.

EBENEZER SAGE.

I, Abraham Crocheron, clerk of the town of Northfield, in the county of Richmond, and in the State of New York, doth certify and say, that I was one of the inspectors of the votes taken at the anniversary election held in the said town of Northfield, and in the county aforesaid, on the 28th day of April, 1818, at the house of John Johnson, innkeeper, and held, by adjournment, the two subsequent days, for two members of Congress to represent the first congressional district of said State of New York in the House of Representatives of the United States; and, being so an inspector, did make a return in the clerk's office of the said county, as well as with Richard Crocheron, John Hillyer, and Sylvanus Decker, inspectors with me: that Ebenezer Sage had 75 votes, and James Guyon had 75, when in fact and in truth the ballots *were given*, canvassed, and read James Guyon, *junior*, and were returned to the said clerk, through a mistake or error, without the *junior*, when in fact, in truth, and in justice, they should have been given and written James Guyon, junior. Given under my hand, the 16th day of November, A. D. 1819.

ABRM. CROCHERON.

STATE OF NEW YORK, *Richmond county*, ss.

Personally appeared before me Abraham Crocheron, who doth depose and say that the above statement, as subscribed by him, is just and true. And further this deponent saith not. Sworn before me, this 16th day of November, 1819.

DAVID MASEREAU, *Judge.*

This may certify that, on or near the 20th of the month of December last, I received from James Guyon, junior, a copy of the within certificates, correctly according with the same. Sag Harbor, January 3, 1820.

EBENEZER SAGE.

I, Edward A. Clowes, clerk of the town of Hempstead, and I, Thomas Tredwell, one of the inspectors of the town, do hereby certify that, at an election held in the aforesaid

town for Congressman, on the 28th, 29th, and 30th days of April, 1818, the return was made by us to the clerk's office of the county of Queens for James Guyon as Congressman, whereas we verily believe that the returned number of votes ought and should have been made in the name of James Guyon, *junior*, which junior was omitted in our return to the clerk of the said county, according to the best of our knowledge and belief. Dated at Hempstead, November 20, 1819, State of New York.

EDWARD A. CLOWES, *Town Clerk.*  
THOMAS TREDWELL.

Sworn before me this day.

EDWARD PARKER,  
*Deputy Clerk of Queens county.*

I, Robert D. Clements, one of the clerks to the inspectors of the town of Hempstead, do solemnly swear that the statement of the within certificate is true, to the best of my knowledge. Hempstead, November 20, 1819.

ROBERT D. CLEMENTS.

Sworn before me this day.

EDWARD PARKER,  
*Deputy Clerk of Queens county.*

I, Jacobus Montfoort, clerk of the town of Oyster Bay, in the county of Queens, and State of New York, do hereby certify that the certificate of the return of the election for two members of Congress to represent the first congressional district of said State, held in the aforesaid town on the 28th, 29th, and 30th days of April, 1818, was written by me, and transmitted to the clerk of the said county of Queens. And I do hereby further certify that the return of James Guyon, of 83 votes, was a mistake made by me, and that the true and proper return for the aforesaid town of Oyster Bay is James Guyon, junior, for Congressman, 83 votes, and the tickets were canvassed and read James Guyon, junior. Oyster Bay, November 19, 1819.

*Note.*—One vote of the above number of 83 votes was written, read, and canvassed, James Guyon.

JACOBUS MONTFOORT, *Town Clerk.*

Oyster Bay, November 19, 1819. Sworn before me,

EDWARD PARKER,  
*Deputy Clerk of Queens county.*

This may certify that, on or near the 20th day of the month of December, I received from James Guyon, junior, a copy of the within certificates, perfectly according with the same. Sag Harbor, January 3, 1820.

EBENEZER SAGE.

We, Edward Parker, of the town of Jamaica, county of Queens, and State of New York, and Thomas Hazard, jun.



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Evidence con-  
tinued.

of Staten Island, State aforesaid, do solemnly swear that we were present on the day and date when Ebenezer Sage signed the annexed certificates, and did see him subscribe his name thereunto; and he acknowledged that he did receive a copy of the annexed certificates enclosed to him in a letter from James Guyon, junior, declaring his intentions to claim his seat in the House of Representatives of the United States.

EDWARD PARKER,  
T. HAZARD, Jr.

Queens county, ss. Jamaica, January 6, 1820. Sworn before me this day.

JAMES DENTON,  
*Justice of the Peace, and one of the judges of  
the court of common pleas for Queens co.*

On the 14th January, 1820, the preceding report and evidence were discussed in the Committee of the Whole, and were reported to the House, when both the said resolutions were concurred in by the House, and the petitioner was thereupon admitted to his seat.

Petitioner enti-  
tled to his seat.

## SEVENTEENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. SLOANE, of Ohio,  
EDWARDS, of N. C.  
TUCKER, of S. C.  
MOORE, of Va.

Mr. WALWORTH, of N. Y.  
RODERS, of Pa.  
SMITH, of Ky.

### CASE XLVI.

#### PHILIP REED vs. JEREMIAH COSDEN, of *Maryland*.

[Where two candidates had an equal number of votes, the Governor and Council, assuming to act under a State law, "proceeded to decide between them which should be the Representative," and gave their certificate of election to Jeremiah Cosden, who became the sitting member. This proceeding being illegal, and unwarranted by the constitution, was not admitted as evidence of his right to a seat in the House.

The judges of the election, in their canvass of the votes, having rejected two ballots, under the impression that they were double and fraudulent, (according to the terms of the act of Assembly,) evidence was admitted, tending to prove that this was an error in fact, and upon such evidence the votes were ordered to be counted to the party for whom they were given.

Where a single member is to be elected in a district, tickets containing more names than one, are, by the Maryland law, deemed illegal.

Doubts expressed by the committee as to the authority of the decisions in Kelly and Harria, and Easton and Scott, on investigating the legality of votes, where the election is by ballot.]

DECEMBER 6, 1821.

Petition presented, and referred to the Committee of Elections.

On the 11th of March, 1822, the Committee of Elections, to which was referred the memorial of Gen. Philip Reed, contesting the election of Jeremiah Cosden, who is returned as one of the Representatives of the present Congress, from the State of Maryland, and praying to be admitted to a seat in his stead, have had the same under consideration, and report:

That the constitution of Maryland directs that the elections shall be by ballot; that every free white male citizen of the State, above twenty-one years of age, and no other, having resided twelve months within the State, and six months in the county, next preceding the election at which he offers to vote, shall have a right of suffrage in the election of Delegates to the State Legislature; that the State is divided into districts for the purpose of electing Representa-

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tives to Congress ; that the sixth congressional district is composed of the counties of Hartford, Cecil, and Kent. The election for Representatives to the present Congress was held on the first Monday of October, 1820. At that election the memorialist and the sitting member were candidates, and, by the returns from the several counties in said district, as made to the Governor and Council, it appears that the memorialist and sitting member had an equal number of votes, and that neither had the "greatest number of votes," as by the constitution of the State is required, in order to constitute an election. But it further appears, by an official statement of the proceedings of the Governor and Council, bearing date the 18th day of October, 1820, that, in conformity with what was considered to be the provisions of the law of Maryland, the Governor and Council "proceeded to decide between them which should be the Representative, and the result was that Jeremiah Cosden, Esq. was decided to be the Representative for the said district." The committee are aware that to question the right of the Executive authority of Maryland to give full operation to the provisions of its election laws, will be considered as a measure of an important character. It is understood by the committee that the authority, under which the Governor and Council acted, is the act of the State of Maryland, passed the 14th of December, 1790, chapter 16, section 13. This provision of the act, the committee believe, has been repealed by the act of the 2d of January, 1806. But they consider it unnecessary to enter into an argument on this point. The constitution of the United States, article 1, section 2, provides, that "The House of Representatives shall be composed of members chosen every second year by the people of the several States ; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." Section 5 of the same article provides that "each House shall be the judge of the elections, returns, and qualifications of its own members." On the first Monday of October, 1820, in conformity with the law of Maryland, an election was held by the qualified electors of the sixth congressional district. On that day they either did, or did not, elect a member to Congress. None could be elected unless he received a greater number of votes than were given for any other candidate. The term election must mean the act of choosing, performed by the qualified electors, in conformity with the requisitions of the constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors, on the day appointed, should fail to make a choice, it is confidently believed that no other authority of the State can, at any other time, make good this defect. Let it be supposed that the electors should fail to attend an election ; that, consequently, no election is held ; would it

Meaning of the  
word election.

then be contended that the Executive authority could, by lot or otherwise, appoint a Representative for such district in the Congress of the United States? This is a power which, it is presumed, none will contend does exist. Yet it is believed to be nothing more than that which has been exercised by the Governor and Council of Maryland, in the case under consideration. In this case, the electors assemble, they proceed to elect, they make no choice, they come to no constitutional result. It is asked, what is the difference between the two cases? The one would be an appointment, because no election had been held; the other, because no choice had been made. The committee being of opinion that the power thus virtually exercised by the Governor and Council of Maryland, in appointing a Representative to the Congress of the United States, being contrary to the express provisions of the constitution, and one which this House cannot sanction, have no hesitation in rejecting the official statement of the proceedings in the case as evidence of the right of the sitting member to a seat in this House.

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Having disposed of this part of the subject referred to them, the committee proceeded to an examination of the claims of the memorialist, and the objections of the sitting member thereto. The memorialist alleges that at the election district No. 1, in Kent county, at said election, two tickets or ballots were thrown away by the judges of the election, and not counted, which tickets were given for him, and ought to have been set down and counted to his poll. These tickets, it appears, were thrown away under an impression that they had been folded together with a fraudulent intention, previous to their being put into the ballot box. On the part of the sitting member it was contended that at Elkton, in Cecil county, two tickets under similar circumstances were thrown away, and not counted, which ought to have been added to his poll, and that, at the same district, the memorialist was allowed one vote on account of a ticket on which was the name of the memorialist, together with that of five other persons, without any other designation than that of "for Congress." It was also contended by the sitting member that sundry illegal votes had been given for the memorialist, which, if deducted from his poll, would give the sitting member a clear majority of votes in his favor. No charges of a want of integrity were made by either party, against any of the officers who had been engaged in conducting the election. Some of the testimony exhibited to the committee had been taken previous to the meeting of Congress, and some has been taken since, under instructions given by the committee, for the government of the parties. It was suggested to the parties by the committee, that it would be satisfactory to have the testimony of the judges and clerks of the election in district No. 1, of Kent county, re-

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specting the double ticket, thrown away ; and such course was recommended as was thought fair and liberal, and best calculated to arrive at a full knowledge of all the principal facts in the case, and the memorialist departed in order to procure additional testimony. At this time, it was understood by the committee that the sitting member rested his claim on the testimony he had already taken ; but a few days subsequent, having stated to the committee that he was apprised of other testimony in the case, and that it was his wish to obtain it, a letter was addressed to each of the parties by the chairman of the committee, appointing the 10th of January, 1822, for the final hearing of the case by the committee, and requesting each to give the other five days' notice of the time and place of taking the additional testimony. The memorialist avers that he did not receive the notification of the committee until it was too late for him to be prepared to take depositions of his witnesses ; until the day appointed for the decision of the case ; and that, on his way to Washington, he accidentally lost the testimony. Under these circumstances, the committee permitted the testimony to be taken a second time, and inasmuch as the sitting member had not attended the taking of these depositions in the first instance, and did not object to them when presented, on account of not having notice, the committee agreed to receive the testimony thus offered. They have been thus particular in detailing all the circumstances that occurred in the case since it came under their cognizance, because, although some of the testimony may be such as strictly might not be admissible in a court of law, yet, as there appeared to be every disposition on the part of both the gentlemen to waive all objections of form, and to pursue a course calculated to arrive at facts, the committee were disposed to be less rigid than under other circumstances they might have been disposed to act. In respect to all the other testimony, due notice has been given by each party, and they attended of or not as they thought proper. In support of the claim of the memorialist, John C. Hynson, one of the judges of the election in district No. 1, of Kent county, states that he took the tickets from the box ; that two tickets were thrown away, on which was the name of Gen. Philip Reed for Congress ; that those tickets were not counted, but rejected, under an impression that they were a double ticket fraudulently put into the box ; but that, after he had passed it out of his hands, he was impressed with a belief that it was not double, and that this impression was confirmed when, on counting out the whole of the ballots, two were wanting to make the number equal to the number of persons voting.

Dr. Beckington Scott, David Vickers, James Price, James Ringgold, James Eagle, jun., Darius Dunn, and John C. Hynson, jun., testify that they were present at the opening of the ballot box and counting of the tickets, and that they

were satisfied that the two tickets thrown away, and which had the name of Gen. Philip Reed on them, were not double, and that, on the final counting of the votes, there being two ballots less than there were names of persons voting, confirmed them in their belief.

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The deposition of Elijah Beck states that he was clerk of the election, but states nothing respecting any of the facts in the case.

William Scott, clerk of Kent county, certifies, under the official seal of said county, a copy of the poll-book of said election, which shows that 365 persons voted at said election, and that only 363 tickets were counted.

The deposition of Joseph Ireland states that he acted as clerk of the election. That the judges drew from the box a double ticket, and threw it away. That he saw it in Judge Hynson's hands. And that, after the votes were counted, and the disagreement between them and the poll list was discovered, Judge Hynson still said it was a double ticket.

Abstract of tes-  
timony.

The sitting member produced the depositions of William Boulden and John Kean. They state that they acted at the election in district No. 2, in Cecil county, in 1820, the first as judge, the second as clerk; and that Gen. Philip Reed was allowed one vote on account of a ticket which had four other names on it, without any other designation than "for Congress." They also state that two tickets were thrown away on account of being doubled.

James Sewall, clerk of Cecil county, gives a certified copy of the ticket alluded to by Boulden and Kean, under the official seal of Cecil county.

The deposition of John Bradshaw states that he was one of the judges of the election in district No. 1, of Kent county. That Judge Hynson drew from the box a ticket which he said was double; the deponent observed that if so, it ought to be destroyed, and it was thrown away. That after the counting was finished, two ballots were wanting to correspond with the book of polls. That he observed to Judge Hynson that perhaps it was a mistake as to the ticket destroyed being double, but he declared it was double, and that it sometimes did happen that the ballots and polls did not agree. Deponent states that he did not see any name on the ticket destroyed, not having it in his hands.

William Scott, clerk of Kent county, certifies, under the official seal of said county, that, during several years past, there has been a difference in some of the districts in said county, between the number of names on the poll-books of election and the ballots counted out.

The law of Maryland, in relation to this subject, is, that "every voter shall deliver to the judge or judges of the election, in which he offers to vote, a ballot, on which shall be written, or printed, the name or names of the person or persons voted for, and the purpose for which the vote is given plainly designated." This law further provides, that



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after the poll is closed, and whilst the ballots are opening and counting, that "if upon opening any of the said ballots there be found any more names written or printed on any of them than there ought to be, or if any two or more of such ballots or papers be deceitfully folded together, or if the purpose for which the vote is given is not plainly designated as within directed, such ballots shall be rejected and not counted."

In support of the allegation of the sitting member, that sundry illegal votes had been given to the memorialist which ought to be deducted from his poll, he produced the depositions of Edward Brown, George Copper, James Coleman, Josiah Massey, and the official certificate of James Sewall, clerk of Cecil county. On the propriety of entering into an investigation of this kind, when elections are by ballot, the committee entertain serious doubt. True it is that the decisions of the House in the case of Kelly and Harris, and Easton and Scott, may be considered as establishing the principle; yet, it is believed that when the circumstances attending those decisions are examined, it may be doubted whether they ought to be viewed as establishing a precedent which shall govern all future decisions. But as no desire is entertained to agitate this question at the present time, the testimony has been received, and attentively examined, but decided to be insufficient to establish any of the facts contended for.

From a full, attentive, and deliberate examination of the case, in all its points and bearings, the committee are impelled to the conclusion that the sitting member cannot, consistent with the constitution of the United States, be allowed to retain a seat in this House, under the proceedings of the Governor and Council of Maryland. That the testimony in relation to the two votes rejected in district No. 1, of Kent county, proves that these tickets were not fraudulent, and that they ought to have been counted to the poll of the memorialist, for whom they were given; and that the vote allowed to him in district No. 2, in Cecil county, ought to be deducted from his poll, as being clearly an illegal vote. Therefore, by adding to the poll of Philip Reed, the memorialist, two votes improperly rejected in Kent county, and deducting one therefrom, for that improperly allowed in Cecil county, he will have a majority of one vote over the sitting member.

The paper marked A, is the answer of the sitting member to the prayer and arguments of the memorialist.

The following resolutions are submitted:

"*Resolved*, That Jeremiah Cosden is not entitled to a seat in this House.

"*Resolved*, That Philip Reed is entitled to a seat in this House."

This report and the documents were committed to a Committee of the Whole House.

A.

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To the Hon. JOHN SLOANE,

*Chairman of the Committee of Elections :*

SIR: In the contested election between Gen. Philip Reed and myself, as it may be presumed that all the testimony on both sides, intended to be produced, or which will now be received, has been submitted to the committee, it seems proper that I should offer a few remarks upon the subject. This would have been earlier done, but for the impression that a partial discussion would rather retard than expedite the ultimate determination. In replying to the petition or memorial of Gen. Reed, I must beg permission to *invert* the order adopted by him. He claims a seat in the House of Representatives, upon the ground that he had a legal majority of votes; and *if such were the fact*, his claim would not be resisted; but I will examine this *fully*, as the second branch of the present inquiry. In the latter part of the memorial the petitioner labors to show that the law of Maryland, under which the sitting member has been returned, is repugnant to the constitution of the United States, and therefore void. This law was passed in 1790, and not in 1791, as stated in the petition, about *two* years after the formation of the constitution of the United States, and by some of those very men who just before had sat in the convention which agreed to adopt that constitution. It, moreover, was passed for the *express, avowed purpose* of carrying that constitution *into effect*, and giving it full operation in Maryland. This is declared to be the object of the law, (see the act itself, 1790, chap. 16.) It must then appear strange indeed, if, under these circumstances, the law shall be found to be at war with the constitution, in one of its most *important* provisions! I *rather presume* the constitution was quite as well understood by the framers of this law as it is now, and I beg leave to add, that I further presume that there *then existed* quite as *little disposition* to violate the constitution, or the rights of the people, as at *this time*. Upon turning to the law, the following provision will be found in the first section thereof: "Whereas it is declared by the constitution of the United States that the House of Representatives, in the Congress of the United States, shall be composed of members chosen every second year by the people of the several States; that the electors in each State shall have the requisite qualifications of electors of the most numerous branch of the State Legislatures, &c. In order, therefore, to carry the said constitution into effect, be it enacted," &c. It is presumed that this section will hardly be contended to be at variance with the constitution. And similar sentiments and language are to be found in the third and eighth sections

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of this same law. Yet, in the thirteenth section, it is provided "that in case *two or more persons* shall have an equal number of votes, the Governor and Council shall determine by lot, from the candidates, who shall be the Representative." Are these several provisions inconsistent with each other? Can they not well stand together, and form parts of the same system of elections? The most rigid critic must admit that they may. Then they may as easily be reconciled to the constitution of the United States. And when it is asked, What are the rights of individual voters? and what are the powers of State Legislatures in relation to elections? this very law furnishes a strong and clear illustration. Every person entitled to vote for Delegates to a State Legislature is also entitled to vote for a Representative to Congress; and he has as high a security for the one right as the other. But upon the presumption that all the voters of a given district have *exercised this right*, (and such is the presumption of law,) and a tie between two or more candidates is the consequence, then the State Legislature, under the power to regulate the *manner* of holding elections for Representatives to Congress, may, if they think proper, provide by law for the determination of the tie, by lot, or otherwise. But in such a case the petitioner would object that the *choice* would not be *by the people*. Mr. Chairman, if we consult the phraseology of the constitution, we shall perceive that the idea of *representation* pervades every part of it; that the constitution itself, though it literally, and in express terms, is declared to be *ordained by the people*, is their act only upon this principle. It commences by saying, "We, the people of the United States;" as if the people were personally assembled, and about to act together. It will be found, sir, that all acts done in the name of the people, or in virtue of authority derived from them, are truly and properly the acts of the people. The President of the United States, for the purposes of his appointment, is as truly and as literally a Representative of the people as a member of Congress. His election is not so immediately the act of the people, but still he is elected *by them*.

But, sir, the petitioner objects further, and asserts, respecting the first clause of the second article of the constitution, (already quoted,) that "the command here is *peremptory*," &c. Now, with submission, I must *insist* that here is *no* command at all, either *peremptory* or *not*. The clause contains a general *declaratory description* of the House of Representatives; but more general it could not well be, and, without forcing its manifest meaning, it cannot be regarded as an authority for any particular *mode* of election by the people. And we have seen that it is perfectly consistent with the law of Maryland, of which it is made a substantial part. Upon the principles of this law, no popular right is violated, no voter has any ground for complaint, nor have

the Legislature of the State transcended their powers in its passage. For I cannot subscribe to the doctrine of the petitioner, when he lays it down, "that the constitution never intended that there should be any interference on the part of a State, as to the election of Representatives to Congress, *further than is expressly declared.*" Sir, the very reverse of this doctrine is the true one. 1831.  
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The States may interfere in any and every case where they are not expressly, or by necessary implication, forbidden. The constitution is no grant of power to the States or to the people; it is a grant *by* them; and all powers not expressly, or by necessary implication, granted, are retained by them. Surely it cannot be necessary to press this subject further. But if this view of the subject should not meet the approbation of the committee and the House, and they should think the law unconstitutional and void, still the right of the petitioner to a seat is not established. He sets up a claim to a seat; and if in point of fact there was a tie, and the law of Maryland is void, then the petitioner has no more right to a seat than any other person in the community; and, if there was a tie, and the Maryland law is a valid one, then, too, is there an end of the question. The claim of the petitioner rests wholly upon the fact of his having a majority of legal votes; and unless he can prove this fact to the satisfaction of the committee and the House, he must fail: and whatever opinion the committee and House may entertain of the law of Maryland, if it shall appear by proof that the sitting member had a legal majority of the votes, his seat will be confirmed as a matter of course. I will therefore proceed, Mr. Chairman, to an examination of the testimony which has been produced and laid before the committee, remarking that, in this as in all other cases of claim, the *onus probandi* lies upon the claimant. But the sitting member will go further; he will endeavor to show, by proof, that there was a legal majority of votes given in his favor, and that the majority is decidedly against the petitioner.

The petitioner rests his claim solely upon two tickets, *rejected by the judges as a double ticket.* He states that these tickets were single, and not double, and that they contained his name for Congress. Mr. Chairman, both these positions are denied positively, and the evidence is appealed to with perfect confidence to settle the question. The petitioner produces several affidavits, mentioned in his petition, to prove that in the first, or lower district of Kent county, at the time of counting out the ballots, one of the judges, Mr. John C. Hynson, the junior judge, drew from the ballot box a ticket, which, at the time, he declared to be a double ticket, from its size. He passed it (say these deponents) to John Bradshaw, the presiding judge, unopened. Mr. Bradshaw, they say, opened the ticket, and found it to be double, upon which it was rejected, but that each of those tickets

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contained the petitioner's name for Congress. The deponents further state that they were under the impression that these tickets were single, and not double, as supposed by the judges, and that their impressions were confirmed, when, upon finally comparing the number of tickets with the number of the names of the voters upon the poll-book, there was a difference of two.

This is the amount of all the testimony produced by the petitioner, which is in his favor. His witnesses contradict each other, and are contradicted by those produced by the sitting member in so strong a manner, and to such extent, that only a few facts are left undisputed between them. It is, however, certain that Judge Hynson drew a ticket from the ballot box of such unusual size as to induce him to remark at the time, that, *from its size*, he supposed it must be double; that it was only from the size of the ticket, and not from any other visible appearance, he was induced to make this remark. The ticket was so folded together that no one present, not even the acute Dr. Beckington Scott, who observed it when it was first drawn from the box, could determine whether it was single or double, until it was opened. To this point the evidence is uncontradicted. There is no witness who denies this to be the character and description of the ticket. When the ticket was opened it proved to be double, and was very properly rejected by the judges. All the witnesses concur in stating the rejection of this ticket as the *joint* act of the judges. There was no *dispute*, no *doubt* about it, not a dissenting voice, not even a whisper among the warmest friends of the petitioner. Thus far the evidence may be safely trusted, because it all agrees. The question then is, was this properly a double ticket? or did two separate tickets thus enfold themselves by chance? If the committee and the House believe this was a double ticket, then there is an end of the petitioner's claim, whatever names may have been written upon the tickets. If tickets be loosely folded when deposited in the ballot box, by pressing them together with a stick or quill, or by shaking the ballot box itself, they may become partially enfolded in each other; but, in such a case, there can never be any difficulty in deciding, by *sober* judges, who possess common *eyesight*. But if a ticket, so folded as to answer the description of the ticket in question, be deposited in the ballot box, none of these means, or any instrument of chance, will be sufficient to produce an *enclosure* of one ticket in another. The thing is, ordinarily speaking, impossible. It will be recollected that the judges acted upon oath in this case, and that, as to this matter, they fully and explicitly agreed. They signed a joint return in conformity to this determination, which has become a public record. If either of them had felt the smallest doubt, or had been under the slightest impression that the ticket was improperly rejected, he was bound to

communicate it to the other judges, and to rectify the mistake before the return was made. But, in point of fact, for the proof of this is also uncontradicted, Judge Hynson declared, after all the votes were counted out, and after the deficiency was discovered, "that he was certain that it was a double ticket, and could not be counted." This Judge Hynson also remarked, at the same time, "that he had acted as judge several years, and that the tickets counted out often disagreed with the book of polls." And I would refer to the certificate of the clerk of Kent county, which has been laid before the committee, for numerous instances, in different years. By this document, it will appear that the tickets counted out oftener *disagreed* with the book of polls than accorded with it. Sometimes there was a difference of one, at other times two and three, &c.

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This has been attempted to be explained by the deposition of Mr. Beck, produced by the petitioner, in a manner not a little singular, and to which I must request the attention of the committee. Mr. Beck states that it was the practice to throw away scattering votes, and not to count them; but that, in 1820, columns were raised for all scattering votes, &c. Mr. John C. Hynson is made to speak to the same effect; I say is *made* to speak. I shall have occasion to notice this more fully hereafter. Mr. Chairman, what proposition is this? What is its character? Has it been the practice for the judges to violate their oath? When votes are counting out, how is it possible to tell, when a ticket is produced in favor of an individual, how many more he will obtain? And how can a judge know who is a candidate, except by the tickets as they appear?

But, sir, these gentlemen will admit that it was the practice to keep a column of *numbers*, if none was kept for scattering votes, and in this numerical column the number of the tickets was kept, independent of any or all the candidates. The object of keeping this numerical column was to ascertain, as far as possible, the correctness of the whole proceeding. But it is a fact that mistakes have frequently occurred in the hurry of an election. Names have been placed on the poll-book who did not vote, and others have been omitted who did vote. We have a very recent instance of a zealous and distinguished politician who voted, but his name, though as well known as any in the county, was not entered on the book. This is the true and natural solution of all the difficulty.

Only suppose, in the case before us, that one single name was entered upon the books by mistake, (a thing that happens every day, and in all bodies or assemblies of men,) and then we have additional proof that the ticket *was double*. And permit me to inquire whether this is not a much more probable supposition, than that the judges should be deceived as to a fact of so plain, so palpable, and so simple a cha-



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racter. Even a slight attention to the different depositions is sufficient to show that no claim can be raised upon such evidence. Whether Hynson, for example, opened the ticket in question, or whether it was passed to Bradshaw, and opened by him, is asserted and denied most positively, by different witnesses. But all the testimony is calculated to demonstrate that the ticket was *truly a double one*. It then only remains to explain the disagreement between the poll-book and the tally, which, it is presumed, has been satisfactorily done.

The deposition of Judge Bradshaw is entitled to entire confidence—a gentleman of high respectable character, in every view of it, and a witness who has acted with the most perfect propriety throughout. When called upon, on the 2d of January last, to give testimony in presence of the petitioner and sitting member, he *attended*, and coolly and deliberately stated the facts, before them, in so clear and circumstantial a manner, as to leave no doubt of his veracity.

It would give me pleasure to be able to indulge in similar remarks as to Mr. Hynson; but this gentleman, though called upon in the same manner, and requested to attend at the same time, and give his evidence in the presence of the parties, refused, or neglected to do so. This is proved by the deposition of Morgan Brown, junior, who had requested the attendance of Mr. Hynson.

A letter was then sent to Mr. Hynson, by the sitting member, requesting him to state in writing his knowledge and recollection upon the subject. Mr. Hynson, it is confidently believed, received this letter, but took no notice of it. Afterwards, in the absence of the sitting member, on the 10th of January, it seems he gave a deposition to the petitioner, which the latter states he lost on his way to this city. Subsequent to this, on the 12th of February last, Mr. Hynson, it seems, made oath again for the petitioner, and, to guard against casualties, swore to two depositions, signing one, and not signing the other; the latter is endorsed “a duplicate,” and is produced; the former, which was signed by him, as stated by the petitioner, is not produced. All this operation of making depositions and duplicate depositions, on the part of this witness, was in the absence of the sitting member. This witness had refused to attend, he had refused to put pen to paper, he had refused to utter a word when the sitting member could be present, but in his absence he voluntarily furnishes depositions and duplicates to the petitioner, to his full satisfaction. And, in the duplicate produced, Mr. Hynson is made to say that “the two votes or ballots were thrown away, and not counted to the polls of Gen. Philip Reed, as the deponent was satisfied they should have been.” And was this deponent really satisfied that two tickets were thrown away which ought to have been counted to the poll of the petitioner? What! and he a judge, and say not one

word about it, but declare publicly that the ticket was double, and could not be counted! And all this even after the whole of the tickets were counted out! Then to sign a return, under oath, which he knew was incorrect! Has Judge Bradshaw acted in this manner? I appeal to every bosom in which there may yet remain one solitary spark, one lingering trace of honorable feeling! From Judge Bradshaw's deposition, it appears that there must have been a mistake as to the names upon these tickets. He swears, positively, that he saw no name upon them; he only saw an eagle at the top on the inside. Now, as this was a mark of that ticket upon which the petitioner generally run at that election, it may be that the by-standers who saw it might have inferred that the petitioner's name was upon it; for it must be remembered that the name of the petitioner was printed at the bottom of the tickets upon which it was printed at all, below the names of the county delegates, though in some instances it was stricken out, and the name of the sitting member inserted.

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Letter of the  
sitting member.

The deponents named in the memorial, or rather some of them, say that the double ticket had upon it "General Philip Reed, for Congress." I feel no disposition, Mr. Chairman, to cavil, or to raise frivolous objections, but I hope to be pardoned for remarking that here is a striking proof of the incorrectness of the recollection of these deponents. There were no printed tickets used at that election containing this inscription! And, to prove the fact, sir, I submit to the inspection of the committee the whole of the tickets of one entire district in that county, as they were taken from the ballot box. The tickets are either stamped with an eagle at the top, or without one; but upon no one printed ticket can this superscription, inscription, or whatever you may please to call it, be found; yet these deponents use the same words, and in the same order precisely, and their words are carefully *marked*. What is the inference? These deponents saw what never existed! So much for these *ex parte* depositions!

I am much mistaken, Mr. Chairman, if these views of the subject do not satisfy the committee that the petitioner has wholly failed to establish his claim to the benefit of these tickets.

But, sir, be this as it may, I will now proceed to show that there was a decided majority *against him*. I have hitherto called the attention of the committee to the pretensions of the petitioner, and the allegations and proofs offered by him. Now I must claim the indulgence of the committee while I present a brief and condensed view of the pretensions, allegations, and proofs of the sitting member. First, it is in full proof that the petitioner was allowed by the judges of the Elkton district, in Cecil county, the benefit of a ticket containing *five names*, all for Congress. The

1821. ticket was carefully deposited with the clerk of Cecil county,  
 17th CONGRESS, by the judges, and a true copy, under his official seal, has  
 1st Session. been submitted to the committee, with the affidavits of the  
 Letter of the judges and clerk, stating that the petitioner was allowed a  
 sitting member. vote on account of that ticket.

The committee will observe that the judges, in this case, erred in a question of law, and not of fact, and that, upon every principle of law, and, indeed, of good sense, this ticket should have been rejected. By the election law of Maryland, it was an absolute nullity. But, in the nature of things, it must be so, even if no positive statute existed upon the subject.

What would be done in the case of a ballot for a committee of seven, if, upon counting out, a ticket should be found with *ten* names upon it? or if, in balloting for a Speaker, a ticket should be found with two or three names upon it? We all know that such tickets must, upon the principles of reason and justice, be null and void. Mr. Chairman, I respectfully apprehend that it is altogether unnecessary to attempt further to illustrate or enforce this part of the subject, and feel the most entire confidence that the committee will deduct this ticket from the poll of the petitioner, to which it ought never to have been added.

I will next call the attention of the committee to a vote given to the petitioner in Kent county, by Theodore Burr. This man had no residence in Kent county at all, except merely going there and undertaking to build a bridge, and being actually in the county part of his time, on that account.

His residence, if he had any in Maryland, was in Cecil county, and not in Kent, where he voted. He had been sued in Cecil, as his proper county, (and, by the law of Maryland, a person must be sued in his proper county,) and prosecuted to judgment, and an execution had been issued and served upon his body, returnable, and was returned, to the April court of that county in 1820. At that court, Mr. Burr was committed to jail, where he remained until late in June, or early in July. After this he went to Kent, and, on the first Monday of October in that year, voted for the petitioner. The certificate of the clerk of Cecil county, already laid before the committee, the law of Maryland referred to, and the deposition of James Coleman, fully prove this statement. This man had nothing in Kent county deserving the name of residence at the October election; but whatever he had, it was not of six months' previous continuance as required by law to entitle to a vote.

I will also ask the attention of the committee to the vote of Thomas Glanvill, given in Kent, for the petitioner. Glanvill had no residence. That he had no residence, is fully proved by George Copper, and that he voted for the petitioner, is proved by Morgan Brown, the present sheriff of

Kent county. I refer to their depositions before the committee.

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I will ask permission, Mr. Chairman, to present another case to the view of the committee.

Letter of the  
sitting member.

Gideon Lusby voted for the petitioner, and was under age at the time. I refer to the deposition of Joseph Massey to prove this. Here then are *four votes* to be deducted from the poll of the petitioner, which will establish a decided majority against him. And it should not be forgotten that the depositions in these cases were not *ex parte*, but were taken in the presence of the petitioner, who *cross-examined* the witnesses. I am aware, however, Mr. Chairman, that objections may be made to this kind of testimony, and am prepared to support it, both upon principle and precedent. But no objection can properly now be made by the petitioner, because he entered into the evidence himself, by instituting a cross-examination, and it is believed that no serious difficulty can be raised by any one to this course of proceeding. It is as common as it is easy to make off-hand superficial objections to any thing.

What is the great difficulty in receiving this evidence? Sir, I have often felt surprised to hear the answer. It is said, by giving a man's declarations in evidence, you make him a witness against himself! Surely, if a man of any understanding ever advanced this proposition, it must have been without consideration. Is it not a principle of general law that you can give a man's declarations or acknowledgments in evidence against him, both in civil and criminal cases? You cannot give a man's declarations in evidence *for him*, nor can you compel him to be a witness against himself; but if he, without compulsion, confess or declare a matter which may operate against him, either civilly or criminally, this may be properly given in evidence against him. I said this was a principle of general, but perhaps I might have said of universal law. Such a confession, it is true, may affect a *particeps criminis* to a certain extent, or it may have a qualified effect upon one having an interest in the subject to which the confession or declaration relates; and certainly it ought to have these effects. Innumerable instances might be put to illustrate this principle, but I fear I shall be tedious. In the State of Maryland, two years ago, after much consideration, it was solemnly determined that this kind of evidence should be received and acted upon. Nor is it any answer to this case to call it a high-handed measure of party, &c. For such was not its character. And only last winter the General Assembly of Maryland issued a commission to three persons in Cecil county, authorizing them to take testimony relative to illegal votes. But, Mr. Chairman, the principle has been sanctioned again and again by Congress; and, in addition to the cases heretofore named to the committee, I will, on the present occasion, only no-

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tice one ; it is a case decided from Tennessee, in the thirteenth Congress : Thomas and Kelly. The circumstances of this case will be found applicable to the case before the committee. If I have been able to make myself understood by the committee, I presume there is a final end of the petitioner's claim. It is less substantial than the shadow of a shade.

Perhaps I owe an apology to the committee for the trouble I have given them in this case ; but I trust they will credit me when I assure them that my prevailing wish has been, from the beginning, to render their investigation as easy and agreeable as possible. In the present communication I have deemed it advisable, for the sake of brevity, to omit a number of circumstances which are of some importance to the different views which might be taken of this case.

JEREMIAH COSDEN.

March 7, 1822.

Proceedings  
upon the report  
in the House.

On the 15th March, 1822, the petitioner was heard by the House in support of his claim to a seat, and a debate at some length took place, in Committee of the Whole, upon the merits of the case. On the 18th, this committee, (of the Whole House,) having under consideration the preceding report, reported to the House the resolutions with which it concludes, with an amendment to the latter resolution—to insert the word “not” therein after the word “is,” so as to make it read that “Philip Reed is *not* entitled to a seat in this House.”

On the question, whether the House would concur in this amendment, it was decided in the affirmative by a vote of 73 to 71.

On the 19th March, the subject was resumed, and the resolution declaring that “Jeremiah Cosden is not entitled to his seat,” reported by the committee, was agreed to by the House.

The question was then stated, that the House do agree to the second resolution as amended, to wit: “*Resolved*, That Philip Reed is not entitled to a seat in this House ;” when Mr. WRIGHT moved that the House do reconsider the vote taken yesterday, on the question to concur with the Committee of the Whole House in their amendment, inserting the word *not* in the said second resolution ; which motion was determined in the negative.

The question then recurred on agreeing to the said second resolution as amended ; when Mr. CHAMBERS moved to amend the same, by inserting after the words, “*Resolved*, That,” these words, viz. “Jeremiah Cosden and Philip Reed, having an equal number of votes, therefore :” this motion was determined in the negative.

The question was then put on agreeing to the said second resolution as amended, when there appeared yeas 74, nays 75.

The Speaker (Mr. P. P. BARBOUR) voted in the affirmative, thereby making an equal division; and so, under the rule, which declares that in "all cases of ballot the Speaker shall vote, in other cases he shall not vote, unless the House be equally divided, or unless his vote, if given to the minority, will make the division equal, and, in case of such equal division, the question shall be lost," he decided that the resolution was lost, and, as a necessary consequence thereof, that the converse of the proposition contained in the said resolution was affirmed, to wit, that Philip Reed is entitled to a seat in this House.

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Proceedings in  
the House on  
the consideration  
of the committee's report.

From this decision, Mr. BALDWIN appealed to the House; and on the question, Is the decision of the Speaker correct? it was determined in the negative.

Mr. SAUNDERS then moved that the House do come to the following resolution::

"Resolved, That Philip Reed is entitled to a seat in this House as one of the Representatives from Maryland;" which passed in the affirmative by a vote of 82 to 77; whereupon, the petitioner was qualified, and took his seat.

Petitioner entitled to his seat.

## CASE XLVII.

CADWALLADER D. COLDEN vs. PETER SHARPE, of N. York.

[The inspectors of the election made some errors in their returns to the canvassers, in the petitioner's name; whereby it was taken for a different name: these errors were permitted to be corrected. Votes fairly and honestly given ought not to be set aside, for any omission or mistake of the returning officers. It has been the usage to allow them, and no argument can be necessary to prove that the uniform decisions of the House of Representatives, since the formation of the Government; in such cases, have been correct.]

DECEMBER 6, 1821.

The memorial of Mr. Colden, contesting the right of Mr. Sharpe to a seat in the House, was presented, and referred to the Committee of Elections; and on the 11th of December, 1821, the Committee of Elections, to which it was referred, made the following report:

"That it appears that, by law, the State of New York is divided into districts for the purpose of electing Representatives to Congress. That the first congressional district of said State is composed of the counties of Suffolk, Queens, Kings, Richmond, and the first and second wards of the city of New York, and is entitled to elect two Representatives. That, by the law of said State, elections are held in the several towns and wards, by ballot, before the supervisors,

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relative to elec-  
tions.



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assessors, and town clerks, who officiate as inspectors of said elections. That, after the polls are finally closed and the number of votes ascertained, it is required of the said inspectors to make out a certificate of the election, specifying the number of votes given for each candidate, a record of which is to be made by the town clerk, and a copy of the certificate is to be lodged, by the inspectors, with the clerk of the proper county, who is required to transmit an exact transcript of all the certificates thus delivered to him to the Secretary's office of said State. And the Secretary, Surveyor General, Attorney General, Comptroller, and Treasurer of said State are constituted canvassers of elections, and are required to examine said transcripts, and determine therefrom who are elected in the several districts, and to give to the persons elected certificates of their election. That, in the month of April last, an election was held for Representatives to Congress from the State of New York, and that, by a statement of the votes given in the said first district, at said election, and which statement is under the official seal of the Secretary of said State, it appears that Silas Wood, Peter Sharpe, Cadwallader D. Colden, and Joshua Smith were candidates at said election.

Statement of  
candidates, and  
votes to each.

Silas Wood had . . . . .	3,960 votes.
Cadwallader D. Colden . . . . .	3,339
Peter Sharpe . . . . .	3,369
Joshua Smith . . . . .	3,326
Cadwallader D. Colder . . . . .	220
Cadwallader Colden . . . . .	395

Misnomer in  
clerk's return  
occasioned by  
mistake.

"The 220 votes which appear by this statement to have been given to Cadwallader D. Colder, are represented to have been given in the town of Brookhaven, in the county of Suffolk; and the 395 votes for Cadwallader Colden, are stated to have been given in the town of Hempstead, in Queens county; in which towns no votes were allowed to Cadwallader D. Colden by the State canvassers. Charles H. Havens, clerk of the county of Suffolk, testifies that, by the certificate of election returned to him by the inspectors of the said election in the town of Brookhaven, Cadwallader D. Colden had 220 votes, and that he presumes that in the transcript made out by him, and transmitted to the office of the Secretary of State, the State canvassers have mistaken his final letter in the name of Mr. Colden for an r. Samuel Sherman, clerk of Queens county, testifies that, by the return made to his office by the inspectors of the town of Hempstead, it appears that Cadwallader D. Colden had, in said town of Hempstead, 395 votes, but that, in the transcript which he made therefrom, and transmitted to the office of the Secretary of the State of New York, the letter *D* in Mr. Colden's name was omitted by him through mistake. From which testimony it appears that the votes in the towns of Brookhaven and Hempstead were in fact given for Cad-

wallader D. Colden, and ought to have been so returned and allowed by the officers of the State of New York, at the general canvass of the State; and that, being allowed these votes, it will make the whole number of votes given for Cadwallader D. Colden amount to 3,954, being 585 more than were given for Peter Sharpe.

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"The committee will forbear from exhibiting arguments to prove that votes thus fairly and honestly given ought not to be lost or set aside for any omission or mistake of any of the returning officers. It is conceived to be entirely unnecessary to prove that what has been the uniform decision of the House of Representatives ever since the formation of the Government, in such cases, has been correct. It is to be presumed that Mr. Sharpe has obtained from the proper authority of the State of New York a certificate of his election. There is testimony that Mr. Colden has notified him that he intended to contest his right to a seat, but Mr. Sharpe has produced no testimony whatever, nor signified any intention to resist the claim of Mr. Colden. The committee submit the following resolutions:

Votes fairly given ought not to be set aside, or lost, through mistakes of returning officers..

"*Resolved*, That Peter Sharpe is not entitled to a seat in this House.

"*Resolved*, That Cadwallader D. Colden is entitled to a seat in this House."

Petitioner declared entitled to his seat.

These resolutions were committed to the Committee of the Whole House, and on the 12th of December Mr. NELSON, from said committee, reported them to the House without amendment; and on the question, "Will the House concur with the Committee of the Whole in said resolutions?" it passed in the affirmative; whereupon, the said Cadwallader D. Colden appeared, and took his seat.

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## CASE XLVIII.

MATTHEW LYON vs. JAMES W. BATES, of Arkansas Territory.

[The petitioner's allegations (of facts sufficient, if proved, to vitiate the election) being unsustained by evidence, were considered insufficient, and he had leave to withdraw his memorial.]

DECEMBER 10, 1821.

On the 19th of December, 1821, the Committee of Elections, to which the petitioner's memorial in this case had been referred, reported:

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Elections.

"That, by the official proclamation of the acting Governor of the said Territory, it appears that, at the election for a Delegate for the said Territory, James Woodson Bates and Matthew Lyon were candidates, and that, from the returns made by the sheriffs of the several counties, it appears, upon adding the votes given for each candidate, that James Woodson Bates had 1,081 votes, and Matthew Lyon had 1,020 votes, being a majority in favor of said Bates of 61 votes, who was therefore declared to be duly elected. The petitioner states that this proclamation was founded on improper and illegal returns from several counties, which he has named in his memorial; and that, in many other counties, a large number of illegal votes were given for Mr. Bates, and that in justice the petitioner is entitled to the seat as Delegate from the Territory of Arkansas. He further states that he has made application to the acting Governor and Secretary of the Territory for permission to inspect the return of the election as made by the sheriff of each county, or to be furnished with a copy of such returns, but that both these requests have been positively refused; and that, inasmuch as there is no law existing in the said Territory, whereby he can compel the attendance of witnesses to testify in the case, he is induced to waive what he considers his just right, and prays that a new election may take place.

Petitioner's  
memorial being  
unsupported  
by evidence,  
rejected.

See case of M.  
Leib, ante, p.  
165.

"The petitioner having produced no testimony whatever in support of the allegations set forth in his memorial, the committee submit the following resolution:

"*Resolved*, That the Committee of Elections be discharged from the further consideration of the memorial and documents of Matthew Lyon, and that he have leave to withdraw his memorial;" which resolution was concurred in by the House.

## EIGHTEENTH CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. SLOANE,	Mr. STANDIFER,
BALL,	MALLARY,
TUCKER, of S. C.	THOMPSON, of Ky.
HALL, of N. C.	

### CASE XLIX.

#### PARMENIO ADAMS *vs.* ISAAC WILSON, *of New York.*

[Whether a ballot, having a mark of erasure upon it, though it is still legible, be intended as a blank vote, is a question which ought to be left to the inspectors of the election.

Duplicate or folded ballots, being prohibited by law, are to be wholly rejected, and are not entitled to be counted as single ballots.\*

Where an election has been conducted with fairness on the part of the inspectors, though they may have erred in making their returns, yet their evidence is "competent, and ought to be received, to correct any mistakes that may have occurred in returning the votes given at such election."]

DECEMBER 8, 1823.

Petition presented, and referred to the Committee of Elections.

On the 30th of December, 1823, the committee made the following report:

That, by the laws of the State of New York, "for regulating elections," all elections are by ballot, and are directed to be held by towns in each county within the State, and the supervisor, assessors, and town clerk of the several towns, or a majority of them, are to constitute a board of inspectors, whose duty it is to superintend the elections in their respective towns, and, after making a canvass of the votes given at any election, to cause the same to be recorded in the town books, and transmit to the office of the county clerk a true return of the votes so canvassed, when the same shall be examined by a board of county canvassers. After the whole number of votes given in the county is ascertained, and an entry thereof made by the clerk on the records of the county, he shall immediately make out three certified copies thereof; one of which he shall forward to the Governor of the State, one to the Comptroller, and one to the Secretary of State, to be laid before the State canvassers. The State is divided into districts for the election of Representatives to Congress, and the county of Genesee forms the twenty-ninth district. The election for Repre-

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Committee of  
Elections.

\* See Reed *vs.* Cosden, *ante*, p. 353.

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Elections.

representatives in the present Congress was held on the first Monday of November, 1822, and the two succeeding days. It appears that, at that election, Isaac Wilson and Parmenio Adams were candidates in opposition ; and, by the official certificate of the clerk of Genesee county, it appears that Isaac Wilson, by the returns from the several towns, had 2,093 votes, and that, by the same returns, Parmenio Adams had 2,077 votes. The petitioner rests his claim to a seat solely on the ground that, in the town of China, in said county, the board of inspectors made a mistake, by returning for the sitting member 67 votes, when, in fact, the true number given for him was only 45 votes, and ought to have been so returned. The sitting member relies on three points to support his right to retain his seat. 1st. That in the town of Attica a mistake took place, similar in its nature to the one which occurred in China, by which mistake the petitioner had 98 votes returned for him by the board of inspectors of the election in Attica, when the true number given was but 93 votes, and that so it ought to have been returned. 2d. That, in the town of Middlebury, the board of inspectors rejected one vote which ought to have been counted for him, because, it being a printed ballot with his name thereon, but partially erased with the stroke of a pen, was considered as a blank vote ; and, 3d. That, in the towns of Stafford and Byron, six ballots were improperly destroyed by the boards of inspectors in those towns, and not included in the canvass, which he contends were given for him, and ought to have been taken into the general estimate of those towns. In support of the different allegations of the parties, a number of affidavits are produced, taken in the presence of both. No attempt is made to impeach the character or veracity of any of the witnesses. They are principally officers of the election, chosen by the citizens of their respective towns, and presumed to be gentlemen of respectability. The committee have carefully examined the testimony, and consider it as entitled to full credit. They are clearly of opinion that the testimony respecting the return from the town of China establishes the fact that 22 votes were returned for the sitting member more than the number he actually received ; and they are equally satisfied that, in the town of Attica, 5 votes were returned for the petitioner more than were given for him by the electors of said town. With respect to the vote which the sitting member claims in the town of Middlebury, the committee are of opinion that he has failed to produce proof sufficient to warrant the conclusion that the board of inspectors acted improperly in considering it a blank ballot. This ballot, it appears, was a printed one, and the name of the sitting member was impressed thereon, but " was excluded from the canvass and estimate, because" it was defaced " by one stroke of a pen drawn over the

name, but that every letter was distinct and legible." All the inspectors of election agree in the opinion that, from the manner in which this ballot was defaced, it must have been the intention of the elector who presented it, to have it considered as blank. It will be observed that these inspectors, from the nature of the trust confided to them, and from the obligations they would necessarily feel to discharge their duty with fidelity, together with the superior advantage which their situation afforded them of judging more correctly than any spectator or by-stander could do, must be presumed to be more competent to decide this question than any other persons could be. With the decision of the board of inspectors in this case, the committee are not disposed to interfere. They consider it a question on which it would be impossible to come to any deliberate conclusion, without being possessed of the same opportunity and advantages which were afforded to the board of inspectors. No person can undertake, with safety, to determine, from any description of a ballot of this sort, what decision he might be disposed to make from an actual inspection of the ballot itself. By the law of the State, the board were constituted the judges. They performed their duty, and are still convinced that their judgment was correct; and the committee are not disposed to question their decision. The claim of the sitting member to have certain votes, which are stated to have been given for him in the towns of Stafford and Byron, counted in his favor, is not considered to be sufficiently established by the testimony. All the inspectors agree that the ballots were folded together, and a reference to the poll lists confirmed the fact that more ballots were received than were names on those lists. The suggestion of some of the witnesses, that these ballots *might* have been innocently delivered by the electors, without any intention of committing fraud, will not avail in a case of this kind.\* By the law of the State, every elector who conducts in that way forfeits his right of suffrage on that occasion. The law on the subject is positive. It provides that "*if any two or more ballots are found folded or rolled up together, none of the ballots so folded or rolled shall be estimated.*" Upon a full view of the whole case, the committee are of opinion that the election was conducted with fair and honest intention on the part of the board of inspectors of the several towns to which their inquiries have extended; and that their testimony is competent, and ought to be received, to correct any mistakes which may have occurred in returning the votes given at said election. That justice, in this case, requires that there be deducted from the aggregate number of 2,093 votes returned for the sitting member, the 22 votes

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\* In a subsequent case, the committee allowed a ballot containing *three* names to be counted as *one*. [See Washburn vs. Ripley, first session, twenty-first Congress.]



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which were allowed to his poll by the mistake in the return from the town of China, which will make the whole number of votes to which he is properly entitled, 2,071 ; and that, in like manner, a deduction ought to be made from the aggregate number of 2,077, returned for the petitioner on account of the mistake of 5 votes returned for him in the town of Attica, more than were given for him in that town, which will leave to his poll 2,072 votes, being a majority of one vote over the sitting member. The committee, therefore, submit the following resolutions :

“ *Resolved*, That Isaac Wilson is not entitled to a seat in this House.

“ *Resolved*, That Parmenio Adams is entitled to a seat in this House.”

#### MEMORIAL OF THE PETITIONER.

*To the honorable the House of Representatives in the Congress of the United States of America :*

The petition of the undersigned, Parmenio Adams,  
HUMBLY SHOWETH :

Memorial of the  
petitioner.

That your petitioner and Isaac Wilson were opposing candidates for the office of member of Congress in the twenty-ninth congressional district of the State of New York, composed of the county of Genesee, at an election held in said district on the first Monday of November, 1822, and on the two succeeding days, in pursuance of a law of the said State, to elect a member to represent said district in the eighteenth Congress of the United States of America ; that the whole number of votes given for such member of Congress, at the said election, in the several towns composing the said district, as returned by the proper officers, was 4,170 ; and, of that number, 2,077 were returned as having been given for your petitioner, and 2,093 for the said Isaac Wilson.

And your petitioner begs leave further to represent that the board of inspectors of election for the town of China, in said district, returned to the board of canvassers, appointed by a law of the said State of New York, 67 votes as having been given in said town for your petitioner for member of Congress as aforesaid, and, by mistake, 67 votes as having been given for the said Isaac Wilson for member of Congress as aforesaid ; which said number of 67 votes for the said Isaac Wilson was counted, and allowed by the said board of canvassers, in order to make up the said number of 2,093 given for the said Isaac Wilson in the said district : whereas, in truth and in fact, your petitioner did receive 67 votes in the said town of China ; but the said Isaac Wilson received only 45 votes in the said town ; so that your petitioner did, in truth, receive 2,077 votes in the said dis-

trict; but the said Isaac Wilson did, in truth, receive but 2,071 votes in the said district; which gives to your petitioner a majority of 6 votes over the said Isaac Wilson, there being no other candidates for the office of member of Congress in the said district, at the said election, who received as many votes for the said office as either your petitioner or the said Isaac Wilson.

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Memorial of the  
petitioner.

And your petitioner further states, that, from the facts above stated, which are proved to your honorable body by the affidavits and documents accompanying the prayer of your petitioner, he is entitled to a seat with your honorable body as a Representative in Congress, but that he cannot avail himself of what he considers to be his right, without the aid of your honorable body, the said Isaac Wilson having obtained a certificate of his election in the said district.

Your petitioner, therefore, prays that the seat of the said Isaac Wilson, in your honorable body, may be vacated, and your petitioner have leave to resume the same in conformity to the will of the electors of the twenty-ninth congressional district in the State of New York, as expressed in and by the said election.

And your petitioner will ever pray, &c.

PARMENIO ADAMS.

WASHINGTON CITY, December 1, 1823.

*Letter of the sitting member.*

To the Hon. JOHN SLOANE,  
Chairman of the Committee of Elections :

SIR : Inasmuch as it has been intimated that the Committee of Elections will indulge me in a few suggestions, growing out of the documents submitted to their examination, in relation to the contested election between Major Parmenio Adams and myself, I beg leave to call the attention of the committee to the following: The petitioner, it appears, seeks by affidavit to diminish the vote for the sitting member, in the town of *China*, where the return had been made out in due form under the statute law of the State of New York, officially signed by the inspectors of election, and returned to the district canvassers, and by them allowed and transmitted to the State board, whereon they make their official certificate. Regarding the State law, it is believed that the return should be sustained entire as it is, or rejected altogether, on the ground of improper conduct of the inspectors, as appears from their own testimony. It will be noticed that the town clerk entered the said official return on the town book different from the number contained therein, at forty-five votes for the sitting member, without consulting any one of his associate inspectors, and, but a few days thereafter, made his affidavit that the sitting member had re-

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ceived *forty-six* votes in said town of China. If, however, it should be adjudged proper by the committee, from the case presented, to correct the return of the town of China, in accordance with the memorial introduced by the petitioner, it is expected that the broad ground will be assumed of extending full and perfect equity to the parties, and that he who had the greatest number of votes in the ballot boxes, and was thereby fairly sustained by the greatest number of electors in the district, should be allowed to prevail. The petitioner claims a majority of six votes over the sitting member, by correcting the alleged mistake in the town of China. Under this view of the case, I proceed, sir to an examination of the testimony produced on the part of the sitting member, remarking that he relies, with perfect confidence, on the accumulated testimony, to prove a *mistake* in the official return of the town of *Attica*, in said district, in returning ninety-eight votes for the petitioner, instead of ninety-three, the true number given for him in said town. Six of the seven inspectors and clerks, to wit, four inspectors and two clerks of election of the said town of Attica, all testify that they are clear and distinct in their recollections, and are positive that the canvass of that town gave the sitting member a majority of *thirty* votes over the petitioner; whereas the return to the clerk's office, and official canvass, show a majority of *twenty-five* only. Two of the inspectors, and the two clerks, are equally clear and distinct in their recollections of the particular number given for each candidate; and several of the witnesses recollect distinctly the whole number of votes given in said town for both candidates, and the number of names on the poll lists; and, superadded to this weight of evidence, is a *minute, in writing*, of the candidates' names voted for at the election, with the number of votes given for each, in figures, set opposite, identified by Mr. Stevens, one of the clerks, to be in his own handwriting, taken down by him at the time of the canvass. These six witnesses were examined by the petitioner on interrogatory, and, in my humble apprehension, their answers strengthen the body of their affidavits.

The petitioner made an attempt to rebut their testimony. He introduces three witnesses; first, Simeon Williams, jr., member of the board, and town clerk, who made out the official return, and is made to say, in the body of his affidavit, "That when the said certificate was completed, and the number of votes received and canvassed, *for members of Congress, inserted therein*, as stated to this deponent by the said clerks, he, this deponent, called upon the inspectors and one of the clerks, to the reading, and comparing, &c. which being done, and no objection, &c. it was thereupon signed," &c. Whereas, in his answer to the last interrogatory, he confesses, that upon the call of the board to the reading, "and *after* the reading, one of the clerks said, you have not

got the Congress votes down ; to which he answered he had **not**, and one of the clerks then orally gave him the number of votes, &c., and he is *not certain* whether the returns were compared or not after the addition of the said congressional votes." Thus, in the body of the affidavit, and in the answer to the last interrogatory, are stated distinct facts, directly in collision with each other, which prove that the witness was mistaken in the body of his affidavit ; and there is no doubt that, after the congressional votes were set down, the returns were not read or compared, but were immediately signed and kept by Mr. Williams for record. Moses Disbrow, another witness, stood by one of the clerks, and counted the tally paper at ninety-eight, and saw the clerk count once and set down ninety-eight, as he supposed, by candle-light, and immediately left the room ; did not see the clerk make a second count, nor did he see the other clerk count, or any comparison between them. David C. Miller, the last witness to this point, relates a casual conversation had with George Cooley, Esq. soon after the official canvass was published, and understood him to answer to this question, Do you believe there was a mistake ? Answer. I do not think there was. And several weeks after, Esquire Cooley was understood to say, I have made no affidavit, (meaning to a mistake,) neither do I think I shall. In desultory conversations like these, it is not uncommon to mistake the intention of the person spoken to, and to put a different construction and complexion in detailing such conversations. The understanding of Esquire Cooley is explained in his answers to interrogatories to his own affidavit. And what does he testify ? Merely that, after the whole number of votes were canvassed by the board, and put down by the clerks and compared, the clerks announced to the board that the sitting member had a majority of thirty votes over the petitioner, and the deponent believes that he did receive a majority of thirty votes. Thus much for the attempt to avoid the mistake in *Attica*. We have proceeded so far on the ground of corrections, and the petitioner is one single vote in advance only. In the town of *Middlebury* all the testimony concurs in proving that one printed vote put into the congressional election box, with the name of Isaac Wilson upon it, with every letter legible, and clearly and easily to be read, and without any other name or writing thereon, was thrown aside, and not included in the official return, because it was partially defaced, apparently with one dash of a pen, whereby one elector, who exercised his elective franchise, was excluded and thrown out of said return. Nothing can be more clear than that a blot or a stroke of a pen on the name, which is still perfectly legible, would not authorize the inspectors to throw it aside, on the violent presumption that it meant nothing. Names are to be written or printed on a ballot—if they are legible, it is enough. If this ballot is counted, the

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parties, pursuing the ground of correction, have an equal number, independent of the votes called double.

Permit me, in the next place, Mr. Chairman, to invite the attention of the committee to the testimony relating to the towns of *Byron* and *Stafford*. I mention the two in conjunction, as being in some respects similar. I will, however, first advert to a circumstance which took place in the town of *Stafford*, at the canvass of the votes of said town, which was of an extraordinary character, and in direct violation of the State law—the denying the electors the privilege of witnessing said canvass, and, to effect that object, withdrawing to a more private room, and fastening the usual door of entrance, and had actually made some progress in said canvass, when the first witness accidentally found means of entering the room by a back door. As proof of this, I refer to the affidavits of Gen. W. L. Churchill and Ira Gilbert. In the towns of *Stafford* and *Byron*, it appears that six votes that were in the congressional election boxes, and given for the sitting member, were thrown aside, and not included in the returns; the inspectors, as they testify, supposing that the State law required their exclusion as double votes. But it is confidently believed that an attentive examination of the evidence in those cases will satisfy every candid and liberal mind that they were not “folded or rolled up together,” (the words of the State law,) that is, enfolded together for the purpose of deception, before they were delivered to the inspectors to be put into the boxes.

It is abundantly in proof that those six votes were folded in the usual manner, and as the other votes in the boxes were folded, with the edges out on both sides. For the two votes in the town of *Stafford*, I refer to the testimony of Ezekiel Hall and Marvin Lord, inspectors, and Gen. W. L. Churchill, Ira Gilbert, and Alfred Churchill, and controverted by none. The particular description of the folding is also given by the witnesses, and clearly shows that they might have slipped together in the boxes; and the presumption is strong that they did so slip together, as it is proved by B. Brooks, Esq., S. Griswold, Esq., and Gen. W. L. Churchill, that votes in the State of New York are not unfrequently found thus slipped together, and when thus found have been canvassed and allowed. That the four votes mentioned in *Byron* were folded in the usual manner also, I refer to the testimony of Bartholomew Benham, Edmund Wilcox, inspectors, and Samuel B. James, present at the canvass. That the whole six votes were given for the sitting member, is proved by several witnesses, and stands uncontradicted by any one. I am aware that it will be urged that the circumstance of a disagreement of the poll lists with the votes in the boxes, is proof that the votes were put in double by the electors; but I humbly conceive that it is far from being conclusive proof, when we reflect that they were folded in the usual manner, so that they



might have slipped together, and that it is not unusual that they *are found* thus slipped together; and moreover that it often happens that there is a disagreement between the poll lists and the votes in the boxes, as is proved by Gen. W. L. Churchill, B. Brooks, Esq., and S. Griswold, Esq.; and not unfrequently an excess of votes, which may well happen by the neglect of clerks, through the hurry and bustle of an election, to enter the name of every elector who puts his vote into the boxes, especially when there are three boxes and three poll lists for each elector. From these and other circumstances, is not the presumption too strong to be resisted, that some of them, if not the whole six votes, were given in singly? And, while on this subject, it may be observed that the only possible ground on which the six votes can be set aside, is a fraudulent intention in the electors.

It is not only possible, but very probable, as has been shown, that these votes had slipped into each other by carrying about the boxes from one day's election to another, and from the votes having to pass the scrutiny of the inspectors as they are put in. If these votes are decided to be fraudulent, it must be from presumption merely. It is not easy to distinguish this case from all others, where fraud is never to be presumed, but must be most conclusively proven. Again, suppose that these six votes were all given in double, we have it in proof, to wit, by Gen. Churchill, Gilbert, and James, that they might not only possibly, but probably, in that case, have been hastily received from distributors of votes thus together, and without examination put in, not knowing there were two; and, if so, no fraud could attach to the elector, and, upon the broad principles of perfect equity, disregarding the State law, the double votes should count one. From the production of the affidavits of D. C. Miller and J. B. Lay, identifying a printed sheet of votes, and proving the same to be similar to all the congressional votes printed at the said Miller's office for the election of November, 1822, it is presumed the petitioner intends to infer a mistake by some of my witnesses in describing the caption or label of votes. The proof does not establish the inference; other votes than those printed at that office might have been circulated. But, suppose they were mistaken in that incidental circumstance, which was only introduced to show a dissimilarity between the captions: it may well be supposed that they might misplace the words of the caption, and yet be clear and correct in their recollections as to its *object*, to wit, designating the different candidates; and all that is said in relation to captions is not material, as the name of the sitting member was seen by the witnesses on five of the said six votes, and there is no pretension, in proof, to the contrary. Upon a review of this case, is it not clear that the election of the sitting member was equitably sustained by a fair majority of his district? And that such will be the decision of this honorable

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committee, and of the House, I think the answer will unanimously be in the affirmative.

Respectfully submitted.

ISAAC WILSON.

*Reply of petitioner.*

To the Hon. JOHN SLOANE,

*Chairman of the Committee of Elections :*

Reply of petitioner.

Humbly referring your honorable body to a reperusal of the documents submitted by your petitioner, he respectfully submits the following suggestions:

1. Your petitioner, on a particular examination of the evidence relative to the votes given in the town of *China*,\* assumes the conclusion as irresistible that the facts set forth in the petition relative to those votes are established beyond controversy. In answer to which, the sitting member endeavors in part to balance the majority in favor of your petitioner, resulting from the *correction* of the mistake alleged by him, by showing a mistake in your petitioner's *favor* in the town of *Attica*,† to the number of *five* votes.

On this part of the case it is humbly suggested that a statement of the result of the canvass drawn up at the time (the attention of the inspectors being particularly drawn to the state of the *Congress* votes, and the whole being certified by and in the presence of each of the said inspectors as the constituted judges) should preponderate as a matter of authenticated record evidence *over* the *recollections* of any set of men, in the absence of the original canvass itself, which was preserved, and forms the groundwork from which all the inferences are drawn in relation to the votes in the town of *China*.

2. Should the sitting member be deemed to have established the alleged mistake in the town of *Attica*, (which, however, cannot for a moment be admitted,) still there will remain a majority of *one vote* in favor of your petitioner. It is contended, nevertheless, that a legitimate vote, given for the sitting member in the town of *Middlebury*,‡ was not counted. On this point it is sufficient to remark that the inspectors of the election, having *ocularly* examined the vote itself, were better capable of determining on its legitimacy than any body of men can be from a *description* of the vote given even by the inspectors themselves. And again, the inspectors are, by the election law of the State of New York, made the judges of the validity of that vote; they

\* See affidavits in relation to mistake in *China*.

† See affidavits in relation to mistake in *Attica*, particularly those of S. Williams, jr., and also that of Moses Dishrow.

‡ As to the erased vote in the town of *Middlebury*, see affidavits of Russel Abel, William B. Collar, and Nathan Hubbard, procured by the sitting member, and that of Henry G. Walker, procured by your petitioner.

acted judicially upon it, and it is respectfully submitted that their decision ought to be conclusive in the premises, and not in the nature of a *mistake*, subject to future revision and correction.

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Reply of petitioner.

3. In reference to the *double votes* given in the town of *Byron\** and *Stafford*,† the law of the State of New York makes the inspectors who institute an examination at the time (referring to the proper check provided by the same law, viz. the examination of the *poll lists*) the sole judges. And if, in their judgment, honestly formed, the votes were deemed to have been put in double, then the fraud intended to be guarded against is presumed, and the votes are consequently void.

And your petitioner has the honor to be, sir,

Your most obedient, humble servant,

PARMENIO ADAMS.

The foregoing report having been under consideration in Committee of the Whole House, the resolutions with which it concludes were, on the 6th of January, 1824, concurred in by the said committee, and reported to the House. The first resolution was concurred in; and on the question whether the House would concur with that committee in their agreement to the second resolution, Mr. WHITE moved the following preamble and amendment:

Proceedings in  
Committee of  
the Whole on  
the report of  
the Committee  
of Elections.

“In the case of the contested election of Isaac Wilson by Parmenio Adams, it is doubtful, from the evidence, who ought to have been returned the member to the present Congress from the twenty-ninth congressional district in the State of New York; and believing that no man ought to exercise the high and honorable station of Representative of the people, by virtue of a vote short of a clear majority of those given at the polls; and believing also that the people of that district are competent, and ought, of right, to judge of and correct the return, therefore,

“*Resolved*, That the seat of Isaac Wilson, who was returned as the member from the twenty-ninth congressional district of New York, is vacant.

“*Resolved*, That a writ of election do forthwith issue to supply the aforesaid vacancy, occasioned by the improper return of Isaac Wilson to a seat in this House.”

This proposition to amend was decided in the negative.

A motion was then made by Mr. LITTLE to amend the second resolution by inserting the word *not* after the word *is*. The question on this amendment was also decided in the negative.

\* See affidavits of Samuel Taggart, Bart. Benham, Daniel Dibble, and Edmund Wilcox, procured by the sitting member, and that of Jonathan Nickerson, David C. Miller, and James B. Lay, procured by your petitioner.

† See affidavits of Ezekiel Hall, Marvin Lord, and Isaiah Golden, procured by the sitting member, as to the double votes in the town of *Stafford*.

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Petitioner entitled to a seat.

On the 7th the question was taken to concur with the Committee of the Whole in their agreement to the second resolution, as follows:

*Resolved*, That Parmenio Adams is entitled to a seat in this House." And passed in the affirmative, yeas 116, nays 85. And thereupon Parmenio Adams took his seat, &c.

The following is the testimony upon which the Committee of Elections based the foregoing report:

STATE OF NEW YORK, *Genesee county*, ss.

Testimony upon which the Committee of Elections based their report.

Russel Abel, of the town of Middlebury, and county aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was, on the first Tuesday in March, A. D. one thousand eight hundred and twenty-two, duly chosen supervisor of the said town of Middlebury: that, as such supervisor, he was, *ex officio*, by the laws of the State, one of the board of inspectors of election for a member of Congress for the twenty-ninth congressional district in said State, held in and for said town of Middlebury, on the first Monday of November, and the two succeeding days, A. D. 1822. That, as such, he assisted in canvassing and estimating the whole number of votes given in said town at said election. That, on canvassing the votes for a member of Congress, one printed vote, which was found in the congressional ballot box, and had on it the name of Isaac Wilson, in print, was excluded from the canvass and estimate, and not included in the official return of votes from said town, because there appeared to be one stroke of a pen drawn over the name; but that every letter of the name of Isaac Wilson was distinct and legible, and there was no other name or writing on said ballot; and that, on comparing the names of the electors on the poll lists with the number of votes in the congressional ballot box, the number of both were the same, and they agreed counting said vote so excluded; but, by excluding said vote, the vote of one elector, whose name was on the poll list, was excluded, and was not counted at said election.

*Interrogatories by Parmenio Adams.*

Inter. Was the pen so drawn across said ballot as to render it difficult to read the name?

Ans. I think the letters were clearly discernible.

Inter. What did the board of inspectors of election do with said ballot when it was first discovered?

Ans. I opened the ballot, and cannot say whether it was immediately disposed of or not.

Inter. Was the ballot so much obliterated that the board of election, at the time of canvassing, considered that the person who gave it to the board considered it a blank vote?

Ans. That was the opinion of the majority of the board, and I cannot say it was the opinion of each one.

Inter. Was it considered by the board of inspectors as a blank vote, and did they reject that ballot for that reason? 1823.  
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Ans. It was so considered, and rejected for that reason.

Inter. Then you would distinctly be understood that it was not called and numbered, at the time of canvassing, as a vote? Testimony continued.

Ans. It was not numbered any otherwise than as a blank vote, and therefore was not counted as a vote.

*Cross-interrogatories put by Isaac Wilson:*

Inter. Were all the letters of the name legible and easily discerned?

Ans. I do not recollect any difficulty in reading it.

Inter. Did not one of the clerks at the time contend that the vote ought to be allowed?

Ans. I think so.

*Further interrogatories by Parmenio Adams:*

Inter. What was that clerk's name, and was he, by law, a member of the board of election and canvassers?

Ans. It was Elijah Smith, if any one of either of the clerks, and he was not a member of the board of election or canvassers, by law.

Inter. Was not the said Smith then a brother-in-law to Isaac Wilson, Esq.?

Ans. I so understood it.

Inter. Was it your opinion, at the time, that the ballot ought to be rejected?

Ans. It was.

Inter. From the obliteration made by the pen being drawn across said ballot, do you think that the name of Isaac Wilson was as easily to be read as though it had not been erased?

Ans. I should say not.

Inter. Did it not appear that the erasure on the ballot was made by a dash of the pen?

Ans. It did.

*Cross-interrogatory by Isaac Wilson, Esq.*

Inter. Did the board reject the vote for any other reason; and do you mean in this affidavit to give any other reason than the fact that it was erased in the manner you have described?

Ans. That is the only reason.

RUSSEL ABEL.

Subscribed and sworn, this 31st day of October, 1823, before me,  
JOHN B. SKINNER, Commissioner.

STATE OF NEW YORK, Genesee county, ss.

William B. Collar, of the town of Middlebury, and county aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was, on the first Tuesday of March, A. D. 1822, duly chosen town clerk of said town of Middlebury.

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Testimony  
continued.

That, as such town clerk, he was, *ex officio*, by the law of the State, one of the inspectors of the board of election for a member of Congress for the twenty-ninth congressional district in said State, held in and for said town of Middlebury, on the first Monday of November, A. D. 1822, and the two succeeding days. That, as such, he assisted in canvassing and estimating the whole number of votes given in said town at said election. That, on canvassing the votes for a member of Congress, one printed vote, which was found in the congressional ballot box, and had on it the name of Isaac Wilson, in print, was excluded from the canvass and estimate, and not included in the official return of votes from said town, because there appeared to be one stroke of a pen drawn over the name, but that every letter of the name of Isaac Wilson was distinct and legible, and there was no other name or writing on said ballot.

*Interrogatories by Parmenio Adams.*

Inter. Was the ballot so much obliterated that the board of election, at the time of canvassing, considered that the person who gave it to the board considered it a blank vote?

Ans. I think the person who gave it did not mean to have it count?

Inter. Did you, as one of the inspectors of election in said town, believe that *that* ballot was intended for a vote for any person?

Ans. I did not, and rejected it for that reason.

Inter. Did not each one of the members of the board of canvassers in said town agree to reject the said ballot?

Ans. I do not recollect that any one of the board made any objections.

WM. B. COLLAR.

Subscribed and sworn before me, this 31st day of October, 1823.

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Nathan Hubbard, of the town of Middlebury, and county aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was, on the first Tuesday of March, A. D. 1822, duly chosen one of the assessors for said town, and, as such, was, *ex officio*, by a law of this State, one of the inspectors of the board of election for a member of Congress for the twenty-ninth congressional district of this State, held in and for said town, on the first Monday of November, A. D. 1822, and the two succeeding days. That he assisted in canvassing the whole number of votes given in said town at said election. That, on canvassing the votes for member of Congress, one printed vote, which was found in the congressional ballot box, and had on it the name of Isaac Wil-

son, in print, was excluded from the canvass, and not included in the official return of votes from said town, because there appeared to be one stroke of a pen drawn over the name, but that every letter of the name of Isaac Wilson was distinct and legible, and there was no other name or writing on said ballot.

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Testimony  
continued.

*Interrogatories by Parmenio Adams.*

Inter. Was the ballot so much obliterated that the board of election, at the time of canvassing, considered that the person who gave it to the board considered it a blank vote?

Ans. That, for the reason that it was so obliterated, the board of canvassers considered that it ought not to be counted as a vote.

Inter. Did you, as one of the inspectors of election in said town, believe that *that* ballot was intended as a vote for any person?

Ans. I thought, for the reason that it was so obliterated, that the vote ought not to be counted, and rejected it for that reason.

NATHAN HUBBARD.

Sworn and subscribed before me, this 31st day of October, 1823.

JOHN B. SKINNER, *Commissioner.*

STATE OF NEW YORK, *Genesee county*, ss.

Ira Gilbert, of the town of Stafford, county and State aforesaid, being duly sworn, deposeth and saith, that he, this deponent, attended at the canvass and estimates of the votes given in the said town of Stafford, on the first Monday of November, and two succeeding days, in the year A. D. 1822, at which time votes were taken for a member of Congress for the twenty-ninth congressional district in said State. That he, this deponent, was present at the time when the said votes were received: that, after the polls were closed, the president of the board of electors requested the spectators to leave the room, as they were about to canvass the votes; this deponent requested leave to stay, but the said president requested him to leave the room: that the said board of inspectors then retired into another room to canvass. This deponent then went to the usual door of entrance into the room where said board were, but the door was fastened; he then went round to a back door that led into the said room, and found the said board of inspectors canvassing the votes for a member of Congress, and, while he was present, the president of the said board took up, from the votes given for Congress, two votes, one within the other, and the said president remarked that there were two votes in one, and might have been given by one elector, and remarked that they could tell by examining the poll lists,



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Testimony.  
continued.

and thereupon compared the votes and poll lists. And this deponent saith that he examined the said votes while they were in the hand of the said president, and took them into his own hand, and recollects distinctly, and is positive, that both the said votes were given for Isaac Wilson: that the said votes were a piece of paper about an inch and a half long, and three-fourths of an inch wide: that the words "for Congress" were printed first on said votes on the same side of the paper with the candidate's name: that the votes were then folded back about one-third the width, so as to read "for Congress" on the outside, and the other part of the vote was then folded forward once just so as to cover the candidate's name, so that the said votes were open on both sides, and when folded about one-third of the width when open. And this deponent saith, that the said two votes, so taken up together by the said president, were folded in the same form precisely as the other votes in said box, except that they were together, and might very naturally and probably have slipped together or slipped apart in the ballot box, while said box was carried about from the different places of receiving the votes in said town. And this deponent further saith, that the said two votes so found together might, from their appearance and the manner they were together, very probably have been received (from some person that distributed votes) so together by an honest elector, not knowing that there were two, and put into the ballot box without any fraud or intention to put in two votes.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Were there not more or less spectators present during the canvass?

Ans. While I was there, there were five or six.

Inter. Did you hear any one of the board say at the time that, if the vote was single, the number of names on the poll lists and the number of votes agreed?

Ans. I heard one of them say so.

Inter. Do you know that the name of Isaac Wilson was on those?

Answer in the affirmative.

JRA GILBERT.

Subscribed and sworn, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Ezekiel Hall, of the town of Stafford, county and State aforesaid, being duly sworn, deposeth and saith, that he, this deponent, on the first Tuesday of April, A. D. 1822, was duly chosen the town clerk for the said town of Stafford, and now is town clerk of said town. That, from the records

of the said town, kept in the office of this deponent as said clerk, it appears that Nathan Marvin was duly chosen and sworn into office as supervisor of the said town for the year aforesaid, and that Isaiah Golden, Marvin Lord, and Oliver Campbell were duly chosen and sworn into office as assessors of said town. And this deponent further saith, the said supervisor and assessors were, *ex officio*, by a law of the State, members of the board of election of a member of Congress for the twenty-ninth congressional district of the said State, and that he, this deponent, as the town clerk, was also by law one of the said board of inspectors, and that he, this deponent, assisted to canvass and estimate the whole number of votes given in said town at said election: that Parmenio Adams and Isaac Wilson were opposing candidates for Congress: that, on canvassing and estimating said votes, this deponent distinctly recollects that two votes, which were given for a member of Congress, and were in the box in which were deposited the votes taken for a member of Congress, were thrown out, and were not estimated by the said board of election, nor included in the official return of votes for said town, because they were found together, two in one, the said board supposing they might have been given by one elector, contrary to the law of the State, and that both said votes were folded precisely in the same form, and like the other votes in the box, except that they were together. And this deponent further saith, that the said votes for a member of Congress were a piece of paper about one inch and a half long, and three-fourths of an inch wide: that the word "Congress," or "for Congress," was printed first on said votes on the same side of the paper with the candidate's name; that the vote was then folded about one-third of the width back, so as to read "Congress," or "for Congress," on the outside, and the other part of the vote was then folded forward once, just so as to cover the candidate's name, so that the said votes were open on both sides, and when folded about one-third the width when open.

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continued.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Did the number of votes in the congressional ballot box agree with the number of names on the poll lists, if the double ballot had been single?

Ans. I should say they did, calling the double ballot one vote.

Inter. Do you know whose name was on both or either of the ballots so folded together?

Ans. I do not.

Inter. Were they so folded together that you had no doubt they were both given by one elector?

Ans. I have no doubt they were.

Inter. Were the two votes thus folded destroyed by the consent of the board?

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continued.

Answer in the affirmative.

Inter. At what place was this done, and who was present at the time?

Ans. At the place of canvassing. The board of election were present, the clerks, and others.

Inter. Were there any objections to destroying the two votes by any person belonging to the board of election?

Ans. No objections.

*Cross-interrogatory by Isaac Wilson, Esq.*

Inter. In what manner was the double ballot destroyed?

Ans. Thinks they were thrown on the floor and destroyed.  
EZEKIEL HALL.

Subscribed and sworn, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Marvin Lord, of the town of Stafford, county and State aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was duly chosen and acted as one of the assessors of the town aforesaid, for the year A. D. eighteen hundred and twenty-two; that, as such assessor, he, this deponent, was, *ex officio*, by a law of the State, one of the board of inspectors of the election of a member of Congress for the twenty-ninth congressional district of said State, held in the said town of Stafford on the first Monday of November, and two succeeding days of the year aforesaid; and that, as such inspector, he assisted to canvass and estimate the whole number of votes given in said town at said election; that, on canvassing said votes, this deponent distinctly recollects that two votes, which were given for a member of Congress, and were in the congressional box, were thrown out, and were not estimated by said board, nor included in the official return of said town, the said board supposing they were given by one elector.

And this deponent further saith, that the said votes were folded precisely in the same manner, and were like the other votes in the said box, except that they were double, two in one.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Were those two votes above folded together?

Ans. They appeared to be.

Inter. Was it your opinion, at the time they were folded, that they ought to be rejected?

Answer in the affirmative.

Inter. Were those votes destroyed by consent of the board?

Answer in the affirmative.

Inter. Were they laid on the table for the purpose of taking the opinion of the board whether they were double ?

Answer in the affirmative.

Inter. Did the number of votes in the congressional ballot box agree with the number of names on the poll list if the double ballot had been single ?

Answer in the affirmative.

Inter. How were these ballots destroyed ?

Ans. By being cast away, and not counted.

Inter. Did you compare the poll lists of the congressional votes with the ballots before the canvass was begun ?

Ans. I think they did, and they agreed, and when they discovered the double ballot, they counted again, and discovered one too many, calling the double ballot two.

MARVIN LORD.

Sworn and subscribed, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Isaiah Golding, of the town of Stafford, county and State aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was duly chosen and acted as one of the assessors of the said town, for the year A. D. 1822 ; that, as such assessor, he, this deponent was, *ex officio*, by a law of the State, one of the board of inspectors of the election of a member of Congress for the twenty-ninth congressional district of said State, held in the said town of Stafford on the first Monday of November, and two succeeding days of the year aforesaid ; and that, as such inspector, he assisted to canvass, and estimate the whole number of votes given in said town at said election ; that, on canvassing said votes, this deponent distinctly recollects that two votes, which were given for a member of Congress, and deposited in the congressional box, were thrown out, and were not estimated by said board, nor included in the official return of votes for said town, the said board supposing they might have been given by one elector. And this deponent further saith, that it is his impression that the said votes, so excluded, were given for Isaac Wilson.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Did you get the impression at the time of the canvass that the votes were for Isaac Wilson ?

Ans. I do not know when I formed the impression.

Inter. Do you know whose name was on both, or either of those tickets ?

Ans. I did not.

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Testimony  
continued.

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Testimony  
continued.

Inter. Were those tickets destroyed?

Ans. It is my impression and recollection they were thrown on the floor.

Inter. Were there any objections, by any of the board, to destroying those votes?

Ans. Not that I recollect.

*Interrogatory by Isaac Wilson, Esq.*

Inter. Was it not remarked at the time of the canvass, by some one present, that the votes might have slipped together in the box?

Ans. It was; but Col. Marven, one of the board, said it was impossible.

ISAIAH GOLDING.

Subscribed and sworn, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner.*

STATE OF NEW YORK, *Genesee county*, ss.

Alfred Churchill, of the town of Stafford, in said county, being duly sworn, deposeth and saith, that he attended at the canvass and estimate of the votes given in said town of Stafford on the first Monday of November, A. D. 1822, and on the two succeeding days; at which time, with other officers, a member of Congress was voted for; that, on the said canvass, the assembly, sheriff, and clerk's box were first opened, and, on an attempt to compare the votes with the poll lists, it was found by the board to be impracticable, and the poll list was laid aside; and this deponent believes, and is very confident, that a further comparison of the poll lists and votes was not made until the board discovered what they considered a double vote, taken from the congressional box. The board then made such comparisons; and this deponent further saith, that, on said estimate and canvass, two votes given for a member of Congress, and which were in the congressional ballot box, were excluded, and neither of them counted, nor included in the official return of said town; that the said votes were folded in the same form, and like the other votes in the said box; and, from the manner the votes were folded, they might have slipped together while in the box, as the votes were open on both edges of the paper. And this deponent further saith, that he distinctly understood at the time, and has no doubt, they were both given for Isaac Wilson; that the votes so excluded were taken into the hands of several persons present at the canvassing, and it was said, by some of them, that the said votes were given for Isaac Wilson.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Was you a member of the board?

Answer in the negative.

Inter. Did you have the double ballot in your own hands?

Ans. I did not, but saw it in the hands of one of the board, and of other persons; I am confident one, and think more.

Inter. Did you see the names on those ballots?

Answer in the negative.

Inter. Did you see any comparison made between the votes and the names on the poll lists of the congressional polls?

Ans. Not until they discovered the double vote; then they compared.

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Testimony  
continued.

*Interrogatory by Isaac Wilson, Esq.*

Inter. Were you not present at, and previous to, the commencement of, and during the whole time the board were canvassing the congressional votes?

Answer in the affirmative.

ALFRED CHURCHILL.

Subscribed and sworn, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner.*

STATE OF NEW YORK, *Genesee county*, ss.

Worthy L. Churchill, Esq., of the town of Stafford, in the said county, being duly sworn, deposeth and saith, that he, this deponent, was present at the canvass of the votes given in the said town of Stafford on the first Monday of November, and two succeeding days, in the year A. D. 1822; at which time votes were given for a member of Congress for the twenty-ninth congressional district of New York; that this deponent was present when the said votes were received, and when the polls were closed, and then left the room for a short time, and, on returning, he was informed that the board of election had retired into another room by themselves to canvass the said votes; that he then went to the usual door of admittance into the room where the said board had retired, and found the said door fastened, and he could not get in; that he was then informed that there was a back door leading into said room, to which he repaired, and believes he was the first person, except the said board and clerks, that entered the said room after the said board had retired to it; that, when he entered the said room, the said board were by themselves endeavoring to compare the votes given for clerk, sheriff, and members of Assembly, with the poll lists; but the said board finding so many different candidates on the said votes, and the said votes so erased and disfigured by striking out some names, and writing others, and some being entered on separate slips of paper when names were cut out, that the said board determined it was impracticable, and laid aside the said poll



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Testimony  
continued.

lists, and did not attempt a further comparison, nor did they ascertain whether said votes and poll lists agreed or not. And this deponent saith, that the said board did not, to his knowledge, (and he was present in the room all the time,) attempt any comparison of the number of votes taken for Congress, with the number of names on the poll lists, until they discovered what they considered a double vote; and thereupon the president of the board remarked, on taking up said vote, that there were two in one, and it might have been given by one elector, as it was then found, but that they could ascertain by comparing the votes with the poll lists, and the said board then compared them. And this deponent saith, that he took the said votes, so together, into his own hand, and examined them, and recollects distinctly, and is positive, that they were both given for Isaac Wilson; that the said votes were a piece of paper, about one inch and a half long, and three-fourths of an inch wide; that the words "for Congress" were printed first, near the top of said vote, on the same side of the paper with the candidate's name; that the votes were then folded back about one-third of the width, so as to read "for Congress" on the outside; and the other part of the votes was then folded forward once, just so as to cover the candidate's name, so that the said votes were open on both sides, and when folded about one-third of the width when open; and that the said two votes, so taken up together, were folded in the same form precisely, and like the other votes in said congressional box, except that they were together; and that the said votes might very naturally and probably have slipped together, or slipped apart, in the said box, while it was carried about to and from the several places of receiving votes in said town during the three days of election. And this deponent further saith, that the said two votes, so found together, might very probably have been received (from some person distributing votes) so together by an honest elector, not knowing that there were two in one, and put into the ballot box, without any fraud or intention to put in two votes. And this deponent further saith, that he has occasionally known a disagreement between the names on the poll list and the votes in the box, at former elections in this State, when no double votes were discovered; and that it is not uncommon to see votes slipped together by being moved about in the ballot boxes.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Did the number of votes agree with the number of names on the poll lists?

Ans. I understood they did, calling the double vote one.

Inter. Are you positive there was no comparison of the congressional votes and poll lists previous to the canvass?

Ans. None after I went into the room; and the congressional box was unlocked after I entered the room.

Inter. Were these votes folded closely together?

Ans. They appeared to be folded or slipped together; the length the same, but a difference in the width.

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Testimony  
continued.

W. L. CHURCHILL.

Subscribed and sworn, this twenty-eighth day of October,  
A. D. eighteen hundred and twenty-three, before me,  
JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Stephen Griswold, Esq., of the town of Stafford, being duly sworn, deposeth and saith, that he has resided a number of years in the State of New York; that he has frequently attended the canvassing of votes given at the elections in said State; that the usual method of folding tickets, or votes, which are given in by the electors, is as follows, to wit: The caption or designation of the vote is written or printed near the top, and on the same side with the name or names of the candidate or candidates; the caption is folded back so as to be read on the outside; the lower edge of the vote is folded forward, just so as to cover the name or names of the candidates, so that the edges of the votes are out on both sides; that the votes for Congress, containing but one name, are thus laid in three folds of about equal size, and, when folded, are about one-third of the width when open. And, further, that this deponent has not unfrequently, when attending a canvass, as aforesaid, observed two votes slipped together as though they had been thus folded together, which slipping together might well happen from the handling, jarring, conveying, and carrying the boxes for three days successively. And, further, this deponent has observed that votes, thus together, have been counted and taken into the estimates and returns.

*Interrogatory by Parmenio Adams, Esq.*

Inter. Did you ever know of two ballots being found in a fold together, to be carried forward in the election returns, when there were more ballots than names on the poll lists?

Ans. I did not.

*Cross-interrogatories by Isaac Wilson, Esq.*

Inter. Have you not observed a disagreement between the votes in the box and the names on the poll lists?

Answer in the affirmative.

Inter. Is it not usual for the board of inspectors to draw out a vote from the box when the number of votes exceed the number of names on the poll list?

Ans. It is.

STEPHEN GRISWOLD.

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Subscribed and sworn, this 28th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

Testimony  
continued.

STATE OF NEW YORK, *Genesee county*, ss.

Bartholomew Benham, of the town of Byron, county and State aforesaid, being duly sworn, deposeth and saith, that he, the deponent, was duly chosen and acted as one of the assessors of said town for the year A. D. 1822. That, as such assessor, he was, *ex officio*, one of the inspectors of the election of a member of Congress for the twenty-ninth congressional district of said State, held in said town of Byron on the first Monday of November, and the two succeeding days, A. D. 1822. That he assisted to canvass and estimate the whole number of votes given in said town at said election. That Isaac Wilson and Parmenio Adams were opposing candidates for Congress. And this deponent further saith, that, on canvassing the said votes, two packages of votes, containing two votes each, were thrown out, and were not estimated nor included in the official return of votes for said town, because they were together, two in one. That he, this deponent, said that one of the said votes so excluded was given for Isaac Wilson, and has no doubt that both packages so excluded were given for Isaac Wilson, for they were alike in size and appearance, and from the fact that the caption on the packages excluded was printed "for Congress," in Italics, whereas those given for Parmenio Adams were, in the caption, "Congress," in Roman letters; and this deponent does not recollect that the votes so excluded were folded different from the other votes given for a member of Congress.

And this deponent further saith, that the said votes for Congress were a piece of paper about one inch and a half long, and three-fourths of an inch wide; that the word "Congress," or "for Congress," was printed first on the said votes on the same side with the candidate's name, and generally the vote was folded back about one-third of the width, so as to read Congress on the outside, and the other part of the vote was folded up once so as to cover the name of the candidate, so that the votes were open on both sides, and when folded about one-third the width when open.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Did the ballots for a member of Congress agree in number with the names on the poll lists if the double ballots had been single?

Ans. According to my recollection, they did.

Inter. Were those four votes excluded so folded as to satisfy you that the whole four were given by two electors, each giving two?

Ans. They were.

Inter. Do you know whose name was on the inside of those ballots?

Ans. I know the name on but one, and that was the name of Isaac Wilson.

Inter. Do you know that the caption on the inside votes was the same as on the outside ones?

Ans. I do not.

Inter. Why were those double ballots destroyed?

Ans. Because the board supposed that the law required it.

Inter. Did you entertain any doubt, or any of the inspectors express any, after they examined the law?

Ans. They did not.

*Cross-interrogatory by Isaac Wilson, Esq.*

Inter. Were you not led to believe, from the circumstance, that the four votes excluded were of the same size and appearance, and from the caption on the outside being in Italic letters, they were given for Isaac Wilson?

Ans. I was.

BARTHOLOMEW BENHAM.

Subscribed and sworn, this 27th day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Samuel Taggart being duly sworn, deposeth and saith, that, on the first Tuesday of April, A. D. 1822, he, the said deponent, was elected town clerk of the town of Byron, in the said county of Genesee, and, as such town clerk, he was, by a law of the State, made, *ex officio*, one of the inspectors of the election in and for said town of Byron, and, as such inspector, attended the poll of election held in said town on the first Monday of November, A. D. 1822, and on the two succeeding days, at which election a member of Congress for the twenty-ninth congressional district in the State of New York was voted for; and, on canvassing said votes, it appeared that of the votes given in agreeably to the laws of the State, Parmenio Adams had 60 votes, and Isaac Wilson had 27 votes. And this deponent further states, that, on counting the number of ballots, before the same were opened, and the number of names on the clerk's poll list, the numbers agreed, and were 89; and, on opening the votes to canvass the same, there were found two packets containing more than one vote each, which two packets were so completely folded as to discover only one caption on each; which packets were laid aside, and kept until the canvass of the other ballots was completed, when the poll lists and number of votes canvassed were again compared,

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continued.

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continued.

and it was found that if the said packets with their enclosures were canvassed, the number would exceed the number of names on the clerk's poll lists the exact number of said enclosures: whereupon, the inspectors of election then present at the board, unanimously agreed, in compliance with the law, (which requires all votes where two or more are folded or rolled together, to be destroyed and not counted,) to destroy the whole. And this deponent further states, that he examined only one of the said votes sufficiently to state whose name was contained therein, and on that ballot was printed the name of "Isaac Wilson;" and, from the caption on the outside vote of the other packet, this deponent has no doubt it was given for Isaac Wilson, as the caption on the printed votes for Isaac Wilson was "for Congress," in Italic characters, while on those given for Parmenio Adams, the caption was, "Congress," in Roman characters.

SAMUEL TAGGART.

Subscribed and sworn, the twenty-seventh day of October, A. D. eighteen hundred and twenty-three, before me,  
JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Daniel Dibble, being duly sworn, deposeth and saith, that, on the first Tuesday of April, A. D. 1822, he, the said deponent, was elected as one of the assessors of the town of Byron, in said county, and that, as such, he was, *ex officio*, by a law of the State, one of the inspectors of election in said town, and as such attended the election in said town on the first Monday of November, A. D. 1822, and on the two succeeding days; at which election a member of Congress for the twenty-ninth congressional district, in the State of New York, was voted for; and that, on opening the votes to canvass the same, there were found two packets containing more than one vote each, which were so folded as to discover only one *caption* on each, which were in printed words, "for Congress," in Italic letters: that he examined one of said votes, and found in the same, printed, the name of "Isaac Wilson," and has no doubt, from the said *caption*, that the other vote contained the name of "Isaac Wilson" also; and that said votes were laid aside, and were not estimated, or allowed, or carried forward in the official return of votes of said town; and further, that the caption on the votes given for Parmenio Adams was, "Congress," in Roman characters.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Had you any doubt, from the folding of the ballots, and the poll lists, but they were all four given by two voters, each two votes?

Ans. I had none.

Inter. Do you know whose name was on either, or all of said ballots?

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Ans. Did not examine the inside of but one vote, in which was the name of "Isaac Wilson."

Testimony  
continued.

Inter. Why were the double ballots destroyed?

Ans. Because the law required it.

Inter. Did the ballots for members of Congress agree in number with the names on the poll lists, if the double ballots had been single?

Ans. They did.

*Interrogatories by Isaac Wilson, Esq.*

Inter. Did you not examine the *captions* on three of the four votes in the two double ballots, and find them to agree, being in the words, "for Congress," printed in Italics?

Ans. I did.

Inter. From the circumstance of said agreement, in the *captions*, with that one of said votes containing the name of "Isaac Wilson," do you not believe the name of Isaac Wilson was contained in the others also?

Ans. Has no hesitation to answer in the affirmative.

*Interrogatory by Parmenio Adams, Esq.*

Inter. How were those double ballots destroyed?

Ans. They were torn in pieces by Samuel Taggart, a member of the board, and thrown upon the floor, at the time of the said canvass.

DANIEL DIBBLE.

Subscribed and sworn, this twenty-seventh day of October, A. D. eighteen hundred and twenty-three, before me,  
JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Edmund Wilcox, of the town of Byron, county and State aforesaid, being duly sworn, deposeth and saith, that he, this deponent, was duly chosen and acted as one of the assessors of the said town of Byron, for the year eighteen hundred and twenty-two; that, as such assessor, he was, *ex officio*, by a law of the State, one of the inspectors of the board of election of a member of Congress for the twenty-ninth congressional district of said State, held in the town of Byron aforesaid on the first Monday of November, and two succeeding days, A. D. eighteen hundred and twenty-two; that he assisted to canvass and estimate the whole number of votes given in said town, at said election; that Isaac Wilson and Parmenio Adams were opposing candidates for Congress; that, on canvassing and estimating the said votes, two votes, this deponent distinctly recollects, which were given for a member of Congress, and had the words "for Congress" printed on them, and were in the box in which the votes for



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continued.

a member of Congress were deposited, were thrown out, and were neither of them estimated by the said board of election, nor included in the official return of votes for said town, because they were found together, two in one, the said board supposing they might have been given by one elector, contrary to the law of the State, and that both the said votes were folded precisely in the same form, and like the other votes in the said box, except that they were together. And this deponent further saith, that the said votes for a member of Congress were a piece of paper about one inch and a half long, and three-fourths of an inch wide; that the words "for Congress," or "Congress," were printed first on the said votes on the same side with the candidate's name; that the vote was then folded about one-third of the width back, so as to read "for Congress," or "Congress," on the outside; the other part of the vote was folded up once, just so as to cover the candidate's name, so that the said votes were open on both sides, and when folded about one-third of the width when open.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Had you any doubt at the time, from the folding of said ballots, and the poll list, that both said ballots were given by one elector?

Ans. I have no doubt.

Inter. Do you know what names were on those ballots?

Ans. I do not.

Inter. Why were those ballots destroyed?

Ans. Because the law required it.

EDMUND WILCOX.

Subscribed and sworn, this twenty-seventh day of October, A. D. eighteen hundred and twenty-three, before me,  
JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Samuel B. James, of the town of Batavia, in the county aforesaid, being duly sworn, deposeth and saith, that he was present, a part of two days, at the election held in the town of Byron, in said county, on the first Monday of November, 1822, and the two succeeding days. And this deponent further saith, that he was present at the close of the poll, when the inspectors of said election canvassed the votes, and that Isaac Wilson and Parmenio Adams were opposing candidates for Congress; that, during the canvassing of the votes for a member of Congress, there were found four votes which seemed to be in two parcels, containing two votes each, taken from the congressional ballot box. And this deponent saith, that he took particular notice of the said four votes, and that said four votes were folded as follows, viz. The caption

was folded back about one-third of the width of the vote, so as to read on the outside "for Congress;" the lower edge of the said votes was folded forward so as to cover the name of the candidate, so that both edges of the votes were out, and, when folded, said votes were about one-third of the width when open, and that those four votes were folded precisely like the other votes given for Isaac Wilson for Congress. And this deponent saith, he thinks it is very probable they might have slipped together by being moved and shuffled about in the ballot box while it was carried about to the three different places of holding the election in said town, as, from the manner said votes were together, they could have slipped together, or apart, in the box, without any unfolding, or might very probably have been received (from some person that distributed votes) so together, by an honest elector, not knowing that there were two in one, and put into the ballot box without any fraud or improper intention. And this deponent saith, he is very positive said four votes were given for Isaac Wilson, and knows that three of them were, from the following facts:

When the first two votes, so together, were spoken of, and taken up by one of the inspectors, this deponent saw that the caption on the outside was in Italic letters, thus, "for Congress," and being about one-third open, this deponent distinctly saw the name of Isaac Wilson on the inside vote; and, while the inspectors were conversing respecting the said votes, this deponent saw that the caption on the outside vote was like the inside vote, thus, "for Congress," and that he also saw the name of Isaac, or all the letters except the last, (Isaa) on the outside vote as it was turned forward, but could not see the name of Wilson; that one of the second two votes so together, when discovered, or first spoken of by the inspectors, was partly slipped by the other. And this deponent kept his eye on said votes, and viewed them very closely, and distinctly saw that the caption on the inside vote was the same as the other votes for Isaac Wilson, in Italic letters, "for Congress." Whereas the caption on the votes, or such as came to his knowledge, given for Parmenio Adams, at said election, was "Congress," in Roman letters. And that, before the votes were destroyed, he saw the name of Isaac Wilson on the outside vote; that it was said at the time by some of the board of inspectors, that those votes were given for Isaac Wilson. And one of the inspectors said he suspected that Walker Chase and his brother put in said votes; and this deponent inquired of him if he saw or knew any thing that induced a belief that it was them; to which he replied, nothing more than the fact that they were friendly to the election of Mr. Wilson, or words of like import.

And this deponent further saith, that the said four votes were not included in the estimate of votes of said town, nor included in the official return.

1823.

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1st Session.Testimony  
continued.*Interrogatories by Parmenio Adams, Esq.*

Inter. Did those two packets lie on the table so that you could see and turn them over while the other votes were canvassing?

Ans. They were one or both laid under the box during the canvass, and, before they were disposed of, I took up the box, and turned one of them over.

Inter. Were both of those packets or double votes on the table at the same time?

Ans. I do not recollect.

Inter. What was done with the votes contained in those packets?

Ans. I think they were torn up and thrown under the table by one of the inspectors.

Inter. Were they all destroyed at the same time?

Ans. I cannot recollect whether they were all destroyed at the same time or not.

Inter. Do you know that the caption on all the votes put into the ballot box for Parmenio Adams was "for Congress," or "Congress," with the word "for" prefixed?

Ans. I do not; but such as I noticed were "Congress," without the word "for" prefixed.

Inter. Do you know that the number of ballots in the congressional box compared with the names on the poll list, counting the double ballots four instead of two?

Ans. I think there would have been two more ballots than names on the poll list.

Inter. Were you a member of the board of election in the town of Byron at that time?

Ans. I was not.

Inter. Were you a resident of the town of Byron?

Ans. I was not.

Inter. Did you take the packets into your own hands while the inspectors were canvassing the other votes?

Ans. I think I did not.

*Interrogatory by Isaac Wilson.*

Inter. Had you not been a resident of the town of Byron previous to said election?

Ans. I had, about two years previous to the election.

Taken and subscribed, this 10th day of November, A. D. 1823, before me,

SAMUEL TAGGART, *Commissioner.*

STATE OF NEW YORK, *Genesee county*, ss.

Henry G. Walker, of the town of Middlebury, in the county of Genesee, being duly sworn, does depose and say, that, on the first Monday of November last past, and the two succeeding days, he (being duly appointed and sworn) offi-

ciated as a clerk of the election in the town of Middlebury, in the county of Genesee aforesaid. And this deponent says, that a piece of paper was found amongst the votes in the congressional ballot box, by some one of the members of the board of inspection of the election in said town, which appeared to have had the name of Isaac Wilson printed thereon, but it had evidently been erased, by drawing a pen over said name of Isaac Wilson; and this deponent is strongly impressed with the belief that the said board of inspectors unanimously decided that the said piece of paper ought not to be considered as a vote or ballot, and that the said board of inspectors did, in the presence of this deponent, reject the same. And this deponent verily believes that the said inspectors were perfectly correct in so rejecting said vote, for the reason that it was evident to him (and, as he believes, to the said inspectors,) that the same ought to be rejected, and not counted as a vote.

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1st Session.

Testimony  
continued.

*Interrogatories put by Isaac Wilson, Esq.*

Inter. Could not the name of Isaac Wilson be fairly read?

Ans. It appeared to be a pretty heavy dash with the pen, but could be read.

Inter. Was said canvass made in the evening, by candle-light?

Ans. It was.

HENRY G. WALKER.

Subscribed and sworn to, this 30th day of October, A. D. 1823, before me,

HARVEY PUTNAM, *Commissioner*.

I, Isaac Wilson, hereby acknowledge to have consented to the taking the above affidavit, by Henry G. Walker, at this time. Dated October 31, 1823.

ISAAC WILSON.

STATE OF NEW YORK, *Genesee county*, ss.

Benedict Brooks, Esq., of the town of Covington, being duly sworn, deposeth and saith, that he has resided a number of years in the State of New York. That he has frequently attended the canvassing of votes, given at the elections in said State. That the usual method of folding votes, or tickets, which are given in by the electors, is as follows, viz. The caption or designation of the vote is written or printed near the top, and on the same side with the name or names of the candidate or candidates. The caption is folded back, so as to read on the outside. The lower edge is folded forward so as to cover the name or names of the candidates, so that the edges of the vote are out on both sides. That the votes for Congress, containing but one name, are thus laid in three folds of about equal size, and when folded are about one-third of the width of the vote when open.

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1st Session.

Testimony  
continued.

And further, that this deponent has not unfrequently, when attending a canvass as aforesaid, observed two votes slipped together, as though they had been thus folded together, which slipping together might well happen, from the handling, jarring, and conveying the boxes for three days successively. And further, this deponent has observed that votes thus together have been counted, and taken into the estimate and returns. And this deponent further saith, that he has occasionally noticed, on canvassing the votes, an excess of votes in the ballot boxes, over the names on the poll lists.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Were you a member of the board of inspectors of election, either in the town of Byron, or in the town of Stafford, in said county of Genesee, on the 4th day of November last past, and the two succeeding days?

Ans. I was not.

Inter. When two or more votes are found together, has it not always been the case, so far as your knowledge extended, that the inspectors, at the time of canvassing, examined the situation of said votes? and if they believed that they were folded, and put in together, have they not rejected such votes? and does not the law require it?

Ans. I believe they have, and I think the law requires it.

Inter. Did you ever know votes folded, or rolled together, *appearing* to have been put in together by the voter, to be allowed and counted as legal ballots, by any board of inspectors of election?

Ans. I have discovered a vote included in another vote, which, at first appearance, would naturally be supposed to have been put into the box together; but the number of names on the poll lists convinced the board that they were not put in together; and I have also witnessed other cases nearly similar.

Inter. At what time and place was it that you made the discovery alluded to in your answer to the last interrogatory?

Ans. I have been a member of the board of election, in the town of Covington, for about seven or eight years successively, and some time during that time I made the discovery, but I cannot state the particular time.

Inter. Did you ever know votes thus folded together, appearing to have been put in together, to have been counted, and taken into the estimate of returns at any time, except when it was necessary to make the number of ballots agree with the number of names on the poll lists?

Ans. I never did; and I would be understood to state that I derive my information of the facts above stated, from attending as a member of the board of election, in the town of Covington.

Inter. Do you *know* any instance when two or more votes ever got folded together in the ballot box, by jarring, or otherwise? 1823.  
18th CONGRESS,  
1st Session.

Ans. I could not know the fact, but I have known them to have that appearance, and the board were convinced that that was the case. Testimony  
continued.

Inter. Do you know any thing of the transactions of the board of inspectors of election, either in the town of Byron, or Stafford, at the election for member of Congress, in November, 1822; and whether the said inspectors rejected any votes received into the ballot boxes, or not? and, if they did, do you know that they were illegally rejected?

Ans. I know nothing about any transactions at the board of inspectors of election at that time, in those towns, except by report.

Inter. Do you intend to state, *positively*, that it was not *unfrequently* the case that you have observed two votes slipped together, as though they had been *folded* together?

Ans. I do intend to state it *positively*.

BENEDICT BROOKS.

Subscribed and sworn, this 31st day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Jonathan Nickerson, being duly sworn, deposeth and saith, that he was present at the closing the poll of election for a member of Congress and other officers, in the month of November, 1822, in the town of Byron, in the aforesaid county; and this deponent further saith, that he saw Bartholomew Benham, one of the inspectors of said election, take a packet from the ballot box for the Congress candidates, which was said to contain more than one vote, and hand the same to Samuel Taggart, who was also one of the inspectors of the said election; and this deponent was very particular to see what the inspectors of election would do with the said votes, so folded together, and after the other votes for Congress were canvassed, the inspectors examined the law: whereupon, the said inspectors decided that it was illegal to canvass the said votes which were so folded together, and they were destroyed by Samuel Taggart, the said inspector, who had had the same in his possession from the time they were handed to him by the said Benham, and thrown under the table.

*Questions put by Isaac Wilson, Esq.*

Ques. Do you not recollect there were two double votes found in the congressional box?

Ans. I do not recollect but one.



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18th Congress,  
1st Session.

Testimony  
continued.

And further, that this deponent has not unfrequently, when attending a canvass as aforesaid, observed two votes slipped together, as though they had been thus folded together, which slipping together might well happen, from the handling, jarring, and conveying the boxes for three days successively. And further, this deponent has observed that votes thus together have been counted, and taken into the estimate and returns. And this deponent further saith, that he has occasionally noticed, on canvassing the votes, an excess of votes in the ballot boxes, over the names on the poll lists.

*Interrogatories by Parmenio Adams, Esq.*

Inter. Were you a member of the board of inspectors of election, either in the town of Byron, or in the town of Stafford, in said county of Genesee, on the 4th day of November last past, and the two succeeding days?

Ans. I was not.

Inter. When two or more votes are found together, has it not always been the case, so far as your knowledge extended, that the inspectors, at the time of canvassing, examined the situation of said votes? and if they believed that they were folded, and put in together, have they not rejected such votes? and does not the law require it?

Ans. I believe they have, and I think the law requires it.

Inter. Did you ever know votes folded, or rolled together, *appearing* to have been put in together by the voter, to be allowed and counted as legal ballots, by any board of inspectors of election?

Ans. I have discovered a vote included in another vote, which, at first appearance, would naturally be supposed to have been put into the box together; but the number of names on the poll lists convinced the board that they were not put in together; and I have also witnessed other cases nearly similar.

Inter. At what time and place was it that you made the discovery alluded to in your answer to the last interrogatory?

Ans. I have been a member of the board of election, in the town of Covington, for about seven or eight years successively, and some time during that time I made the discovery, but I cannot state the particular time.

Inter. Did you ever know votes thus folded together, appearing to have been put in together, to have been counted, and taken into the estimate of returns at any time, except when it was necessary to make the number of ballots agree with the number of names on the poll lists?

Ans. I never did; and I would be understood to state that I derive my information of the facts above stated, from attending as a member of the board of election, in the town of Covington.

Inter. Do you *know* any instance when two or more votes ever got folded together in the ballot box, by jarring, or otherwise? 1823.  
18th Congress,  
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Ans. I could not know the fact, but I have known them to have that appearance, and the board were convinced that that was the case. Testimony  
continued.

Inter. Do you know any thing of the transactions of the board of inspectors of election, either in the town of Byron, or Stafford, at the election for member of Congress, in November, 1822; and whether the said inspectors rejected any votes received into the ballot boxes, or not? and, if they did, do you know that they were illegally rejected?

Ans. I know nothing about any transactions at the board of inspectors of election at that time, in those towns, except by report.

Inter. Do you intend to state, *positively*, that it was not *unfrequently* the case that you have observed two votes slipped together, as though they had been *folded* together?

Ans. I do intend to state it *positively*.

BENEDICT BROOKS.

Subscribed and sworn, this 31st day of October, A. D. 1823, before me,

JOHN B. SKINNER, *Commissioner*.

STATE OF NEW YORK, *Genesee county*, ss.

Jonathan Nickerson, being duly sworn, deposeth and saith, that he was present at the closing the poll of election for a member of Congress and other officers, in the month of November, 1822, in the town of Byron, in the aforesaid county; and this deponent further saith, that he saw Bartholomew Benham, one of the inspectors of said election, take a packet from the ballot box for the Congress candidates, which was said to contain more than one vote, and hand the same to Samuel Taggart, who was also one of the inspectors of the said election; and this deponent was very particular to see what the inspectors of election would do with the said votes, so folded together, and after the other votes for Congress were canvassed, the inspectors examined the law: whereupon, the said inspectors decided that it was illegal to canvass the said votes which were so folded together, and they were destroyed by Samuel Taggart, the said inspector, who had had the same in his possession from the time they were handed to him by the said Benham, and thrown under the table.

*Questions put by Isaac Wilson, Esq.*

Ques. Do you not recollect there were two double votes found in the congressional box?

Ans. I do not recollect but one.

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Testimony  
continued.

Ques. Were not the double votes taken up by the inspector from a parcel of Congress votes lying on the table?

Ans. They were taken from the table as the other votes were.

Ques. Were not the double votes partly opened?

Ans. They were partly opened, so as to discover there were two.

Ques. Do you know the inspector kept those two votes in his possession from the time Benham handed them to him, until he destroyed them?

Ans. I think he did.

Ques. Was not Samuel Taggart, the inspector, assisting the other inspectors during the canvass, in canvassing the votes?

Ans. I believe he was; that Benham took up the congressional votes, handed them to Samuel Taggart, who read the congressional votes. The double ones were handed in the same way, but not read.

Ques. Were you present all the time the inspectors were canvassing and estimating the congressional votes?

Ans. I cannot say certainly whether I was or not.

JONATHAN NICKERSON.

Subscribed and sworn, this 10th day of November, 1823,  
before me,

SAMUEL TAGGART, *Commissioner*.

1823.  
18th CONGRESS,  
1st Session.

## CASE L.

JOHN BIDDLE vs. GABRIEL RICHARD, *Delegate from Michigan Territory.*

[The county courts of Michigan Territory are competent to admit aliens to become citizens of the United States.

The qualifications required for office in Michigan are "a residence of one year," and that one shall be "a citizen of the United States:" if there have been the required residence, it is not essential that the person should have been a *citizen* during the whole year; it is sufficient if he were naturalized at the time of the election.]

DECEMBER 11, 1823.

Petition presented, and referred to the Committee of Elections.

On the 13th of January, 1824, the committee made the following report:

The petitioner objects to the right of the sitting Delegate to retain his seat, for the following reasons: 1st. That he is not a citizen of the United States, but, on the contrary, is an alien, owing allegiance to a foreign Power; and that although he has been naturalized before a court of the Territory, yet that this court not being of that description which, by the laws of the United States, is authorized to admit aliens to become citizens, his admission is of no validity.

Report of the  
Committee of  
Elections.

2d. That, even admitting the authority of the court, the naturalization not having taken place one year previous to the election, he is still disqualified from retaining his seat. In entering upon the consideration of this subject, the first point that presents itself is the authority on which the right of a Territory to be represented by a Delegate in the House of Representatives is founded; and next, the qualifications which it is requisite such Delegates should possess. The office is one which is not provided for in the constitution. It grew out of the ordinance of Congress for the government of the Northwestern Territory, passed anterior to the adoption of the constitution of the United States, and has formed the basis of all the Territorial Governments which have since existed. By that ordinance no qualifications were required of the person elected a Delegate; nor do the laws of the United States which have been subsequently passed in relation to the election of Delegates from other Territories, prescribe any. The committee will not attempt to discuss, much less to decide, the propriety of allowing persons, who

1823.  
10th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections.

are not citizens of the United States, or who may owe allegiance to a foreign Government, to hold seats in this House as Delegates from Territories. It will be sufficient to state the fact, that there are no statutory provisions on the subject; and that, unless it can be deduced from the general principles of the constitution, there is no authority to exclude an alien from holding a seat in Congress as a Delegate from a Territory. The case under consideration does not, however, present itself in such manner as to render a decision of this point absolutely necessary. By the documents which have been referred, it appears that the sitting Delegate is a native of France; that he emigrated to the United States in 1792, with an intention of residing therein; that he has so resided until the present time; that in June, 1823, he made application to the court of Wayne county, in the Territory of Michigan, then holden in the city of Detroit, and was admitted to become a citizen of the United States. The question now comes up for consideration, whether this court is of the description which have authority competent to perform acts of this kind. The act of Congress, passed the 14th of April, 1802, entitled "An act to establish a uniform rule of naturalization, and to repeal all the acts heretofore passed on that subject," provides that aliens may be admitted to become citizens of the United States by the "supreme, superior, district, or circuit court of some one of the States, or of the territorial jurisdictions of the United States, or a circuit or district court of the United States."

In a law of Congress which was designed to confer jurisdiction on other courts than those of the United States, and which courts were possessed of different powers, and variously constituted, it would be extremely difficult to describe each court by that name or appellation which it received in the law of the State or Territory by which it was established. Besides, was such precision to be observed, Congress would be under the necessity of altering the law to meet every change which the different States might find it convenient to make in their judicial system, or otherwise the object of the law might, in some States, be entirely defeated. In making provision for the naturalization of foreigners, the intention of Congress obviously was to confide it to all courts which possessed those attributes that would render them safe depositories of the trust reposed. And the terms employed to describe them must be construed to relate to their powers and jurisdiction, and not to the name or appellation by which they were respectively designated in the laws of the States or Territories in which they exist. That this is a fair construction, will appear manifest from the provisions of the third section of the same act, which declares "that every court of record, in any individual State, having common law jurisdiction, and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of

Construction of  
the act for the  
naturalization  
of aliens.

this act." The exceptions taken to the authority of a county court of a Territory to admit aliens to become citizens of the United States, are founded on the reference in this section to State courts, and the omission to include the courts of a similar character in the Territories. But this section, it must be observed, is merely declaratory, and cannot justly be construed to contain any thing more than an explanation of what was intended to be understood by the terms "district and circuit court." Let us see what is the interpretation. It is, "that every court of record which possesses certain other attributes, which are enumerated, is to be considered as a district court." Here is no new grant of power, but only a declaration of the character in which those courts are considered; and the omission of the territorial courts in this section cannot be construed to annul the grant of power contained in the first section. The reason for enacting the third section was, obviously, to explain away certain doubts which appear by the preamble to have existed in regard to some of the courts in certain States; and the presumption is, that, in respect to the territorial courts, no such doubts were suggested; and hence the omission. Should this view of the subject be correct, there can be no doubt but that, by the laws of the United States, the county courts in the Territory of Michigan are to be considered as district courts, and competent to admit aliens to become citizens of the United States; and that, as the sitting Delegate was naturalized before one of those courts, he thereby became, and, in fact, now is, a citizen of the United States.

1823.  
18th CONGRESS,  
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Report of the  
Committee of  
Elections.

Territorial  
courts may ad-  
mit aliens.

The committee will now proceed to the consideration of the second objection, viz. that, even admitting the validity of the naturalization, yet, as it did not take place one year before the election, the sitting Delegate was not, at that time, legally qualified, inasmuch as he had not resided in the Territory one year previous to the election in the quality of a citizen of the United States. The authority relied on to support this position is the act of Congress "authorizing the election of a Delegate from the Michigan Territory to the Congress of the United States, and extending the right of suffrage to the citizens of the said Territory," passed the 16th of February, 1819; and the "act to amend the ordinance and acts of Congress for the government of the Territory of Michigan, and for other purposes," passed the 3d of March, 1823. The former of these acts provides "that every free white male citizen of said Territory, above the age of twenty-one years, who shall have resided therein one year next preceding the election," &c., shall be entitled to vote at such election for a Delegate to the Congress of the United States. The latter act provides that all citizens of the United States, having the qualifications prescribed by the act of the 16th February, 1819, shall be eligible to any office in said Territory. The committee will not undertake



1823. to decide whether the station of Delegate is such an office  
 18th Congress, as comes within the meaning of this act; but, even admit-  
 1st Session. ting that it is, the conclusion will not prejudice the right of  
 Report of the the sitting Delegate to his seat. Neither of the acts referred  
 Committee of to require that the person shall possess the qualifications  
 Elections. enumerated at any other time than that at which the elec-  
 tion takes place. It is not the citizen who is required to  
 have resided in that quality for one year next preceding the  
 election. It is the person, the individual, the man, who is  
 spoken of, and who is to possess the qualifications of resi-  
 dence, age, freedom, &c. at the time he offers to vote, or is  
 to be voted for, or claims the privileges and franchises which  
 these acts bestow. From a careful examination of the case  
 in all its bearings and relations, the committee are impelled  
 to the conclusion that the sitting Delegate was, at the time  
 of his election, a citizen of the United States, possessed of  
 all the constitutional and legal qualifications to render him  
 eligible to a seat in the present Congress, and do, therefore,  
 submit the following resolution:

"Resolved, That Gabriel Richard is entitled to a seat in  
 this House as a Delegate from the Territory of Michigan."

On the 2d day of February, 1824, it was Ordered by the  
 House, that John Biddle, who contested the election and re-  
 turn of Gabriel Richard, the Delegate from the Territory of  
 Michigan, have leave to withdraw his memorial and docu-  
 ments. The sitting Delegate was consequently confirmed  
 in his seat.

Petitioner has  
 leave to with-  
 draw his pa-  
 pers.

1824.  
18th Congress,  
1st Session.

## CASE L F.

## SUNDRY ELECTORS vs. JOHN BAILEY, of Massachusetts.

[A person residing in the District of Columbia, though in the employment of the General Government, is not, within the meaning of the constitution of the United States, an inhabitant of a State, so as to be eligible to a seat in Congress; the word "inhabitant" comprehending "a simple fact, locality, of existence."

Though the citizen of a State, representing at a foreign Court, the sovereignty of the Union, may retain his character of an inhabitant so as to be eligible to Congress, it is otherwise with one who is employed in the domestic service of the Government, out of the limits of his own State.

An inhabitant of a State, within the meaning of the second section of the first article of the constitution, is one who is "*bona fide* a member of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer."]

The petition against Mr. Bailey was signed by seventeen citizens and electors of the Norfolk district, in the State of Massachusetts, and was referred, on the 9th December, 1823, unaccompanied by any evidence whatever, to the Committee of Elections. This fact was, on the 26th December, stated by that committee to the House; and they added that "believing, as they do, that the subject is one of importance, and that it would be satisfactory to the House to have all the facts connected with the case submitted for consideration and decision," the committee submitted the following resolution, which was agreed to by the House, to wit:

"Resolved, That the Committee of Elections be instructed to procure such testimony as they may think proper, in relation to the facts set forth in the petition of the inhabitants of the district of Norfolk, in the State of Massachusetts, against the right of John Bailey, Esq. to a seat in this

1824.  
18th CONGRESS,  
1st Session.

member returned from said district to the present Congress, may not be admitted to a seat in this House; have had the same under consideration, and submit the following report :

Report of the  
Committee of  
Elections.

Of the resi-  
dence of Mr.  
B. in the Dis-  
trict of Colum-  
bia.

The petitioners found their objections to the right of Mr. Bailey to a seat in this House, on the alleged fact that he is ineligible, not being possessed of those qualifications which, by the constitution of the United States, are indispensable to the holding of a seat in Congress, "because, at the time the election was held, at which the said Bailey was supposed to have been chosen, he was not an inhabitant of Massachusetts, but then was, and for many years before had been, and still is, an inhabitant of the city of Washington, in the District of Columbia. In pursuance of the authority vested in the committee by the resolution of the House, they have procured a statement from the Hon. John Q. Adams, Secretary of State, and they have obtained the affidavit of Charles Bulfinch, Esq., of the city of Washington. The Secretary states that Mr. Bailey was appointed by him a clerk in the Department of State, on the first day of October, 1817, at which time he was a resident of Massachusetts, and that he immediately repaired to Washington, and entered on the duties of his appointment, and that he has continued to reside in this city from that time, in the capacity of a clerk in the Department of State, until the 21st day of October, 1823; at which time he resigned the appointment. He further states that he has never known Mr. Bailey to exercise any of the rights of citizenship within the District, but always understood him as considering Massachusetts as his home, and his residence here as only temporary; and that he had considered Mr. Bailey as eligible, &c. Charles Bulfinch, Esq. testifies that he has known Mr. Bailey in this city since January, 1818; that he has resided in a public hotel, with occasional absences on visits to Massachusetts, until his marriage in this city, which took place about a year since, at which time he took his residence in the family of his wife's mother, where he still remains; that he knows of no instance of his exercising any of the rights of citizenship in this District. It appears that the election at which Mr. Bailey was chosen, was held on the 8th day of September, 1823, at which time he was actually residing in this city in the capacity of a clerk in the State Department. The second section of the first article of the constitution of the United States provides "that no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

The subject referred to the committee, they have viewed as one of great national consequence, and they have entered upon the consideration of it with a diffidence corresponding

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with its importance. The difficulty attending the interpretation of constitutional provisions, which depend on the construction of a particular word, renders it necessary to a complete explication, to obtain, if possible, a knowledge of the reasons which influenced the framers of the constitution, in the adoption and use of the word "inhabitant," and to make an endeavor at ascertaining, as far as practicable, whether they intended it to apply, according to its common acceptation, to the persons whose abode, living, ordinary habitation, or home, should be within the State in which they should be chosen, or, on the contrary, according to some uncommon or technical meaning. In what sense this word was intended to apply, can only be determined by reference to the constitution itself; but some light may, perhaps, be thrown on the subject, by consulting the history of the times in which that constitution was formed. It is well known that, at that time, much difference of opinion existed throughout the Union as to what form of Government would be best suited to the situation of the country; and that the difficulties which the convention had to encounter, in adjusting the powers that were to be conferred on the General Government, and those which were to be reserved to the States, were of no ordinary kind. That body was, for a long time, divided into three different parties, unequal in numbers, but alike zealous in support of their favorite theories; one was for a Government of a consolidated form, in which the State Governments would scarcely have sustained their existence; another was for a system of the federal complexion, differing but little from the original compact, under the articles of confederation; and a third was in favor of a Government partaking both of the national and federative principle. Those who were in favor of retaining to the States the greatest portion of their sovereignty, were extremely assiduous and persevering, and it was with much reluctance that they finally agreed to unite in that spirit of mutual concession and compromise, out of which resulted the adoption of the present constitution. This class of politicians had imbibed the opinion that almost any features of a national character, which should be incorporated into the constitution, would, in the progress of the Government, absorb the most essential powers of the States, and render them little more than subordinate corporations; and it was, no doubt, owing to their exertions that many of those provisions were inserted in the constitution, which go to sustain the distinctive character of the several States as component parts of the General Government, and which were intended as effectual checks to its progressive influence. Of this nature is the provision that the States shall be equally represented in the Senate; that the votes in the House of Representatives, in deciding the election of President of the United States, shall be by States,

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each State having one vote; and that none but the inhabitants of the respective States should represent them in either House of Congress. It was supposed that, unless a provision was made, by which State distinctions and State feelings were to be preserved, there would be danger of a people who had so much intercourse with each other, losing their attachment for the State Governments, and thereby add to the powers of the General Government, which many thought, in its origin, alarming in their extent. In connexion with this, there was still another view of this subject, which, in all probability, had its influence with the framers of the constitution, and induced them to confine the people to the election of Senators and Representatives from among the inhabitants of their respective States. They could not but anticipate that, in the progress of time, the General Government would necessarily concentrate, at the seat of that Government, a number of persons who would be engaged in the different branches of its administration, and whose long habit of dependence on those who might fill the chief places in the Government, would do much towards enlisting them in support of almost any cause which the administration might wish to promote. Every person acquainted with human nature must be fully satisfied of the bias which long continuance in particular situations and associations is likely to produce on the mind; and statesmen, so well versed in political history, as were the members of the federal convention in forming a constitution of Government, could not exclude from their minds the course of policy pursued by the British Government in this respect. It was well known to them that, by means of the election of favorites to the House of Commons, through the direct influence of the Government, the ministry were enabled to govern that country in contempt of the public will, thereby rendering representation a mere form. The true theory of representative Government is bottomed on the principle that public opinion is to direct the legislation of the country, subject to the provisions of the constitution, and the most effectual means of securing a due regard to the public interest, and a proper solicitude to relieve the public inconveniences, is, to have the Representative selected from the bosom of that society which is composed of his constituents. A knowledge of the character of a people for whom one is called to act, is truly necessary, as well as of the views which they entertain of public affairs. This can only be acquired by mingling in their company, and joining in their conversations; but, above all, that reciprocity of feeling and identity of interest, so necessary to relations of this kind, and which operate as a mutual guaranty between the parties, can only exist, in their full extent, among members of the same community. All these reasons conspire to render it absolutely necessary that every well regulated Government

should have, in its constitution, a provision which should embrace those advantages; and there can be no doubt it was from considerations of this kind that the convention wisely determined to insert in the constitution that provision which declares no person shall be a member of either House of Congress, "who shall not, at the time of the election, be an inhabitant of that State in which he shall be chosen," meaning, thereby, that they should be *bona fide* members of the State, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer. That this subject occupied the particular attention of the convention, and that the word inhabitant was not introduced without due consideration and discussion, is evident from the journals, by which it appears that, in the draught of a constitution reported by the committee of five, on the 6th of August, the word resident was contained, and that, on the 8th of the same month, the convention amended that report, by striking out "resident," and inserting "inhabitant," as a stronger term, intended more clearly to express their intention that the persons to be elected should be completely identified with the State in which they were to be chosen. Having examined the case, in connexion with the probable reasons which influenced the minds of the members of the convention, and led to the use of the word inhabitant in the constitution, in relation to Senators and Representatives in Congress, it may not be improper, before an attempt is made at a further definition of the word, a little to consider that of citizen, with the view of showing that many of the misconceptions in respect to the former, have arisen from confounding it with the latter. The word inhabitant comprehends a simple fact, locality of existence; that of citizen a combination of civil privileges, some of which may be enjoyed in any of the States in the Union. The word citizen may properly be construed to mean a member of a political society; and although he might be absent for years, and cease to be an inhabitant of its territory, his rights of citizenship may not be thereby forfeited,\* but may be resumed whenever he may choose to return; or, indeed, such of them as are not interdicted by the requisition of inhabitancy, may be considered as reserved; as, for instance, in many of the States a person who, by reason of absence, would not be eligible to a seat in the Legislature, might be appointed a judge of any of their courts. The reason of this is obvious. The judges are clothed with no discretionary powers about which the public opinion is necessary to be consulted; they are not makers, but expounders of the law, and the constitution and statutes of the State are the only authorities they have to consult and obey.

It is not within the knowledge of the committee, that any

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and inhabitant.

\* See Ramsay vs. Smith, first Congress, and Biddle vs. Richard, ante, p. 407.



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Further illus-  
tration of this  
difference.

of the States have constitutional or legal provisions on the subject of expatriation, unless, indeed, the laws in relation to the settlement of paupers should be considered of that description; we are, therefore, left without any certain rule by which to determine what length of absence shall amount to a forfeiture of citizenship. Perhaps, the only safe criterion by which to determine the matter, would be to consider every person who removes from one part of the United States and settles in another, as ceasing to be a citizen of the State from which he has removed, whenever, by the constitution or laws of the place where he has taken up his residence, he is entitled to exercise the rights of a citizen there. From what has already been said, it must appear that the words citizen and inhabitant cannot be considered as synonymous; but it may not be improper to quote some authority in support of this opinion. The difference of situation between the people of the United States and that of any people of Europe, in a political point of view, renders it difficult to find in the writings on either national or municipal law, in that country, any thing exactly in point; all, however, agree in considering inhabitant as connected with habitation and abode. Thus, Vattel says, (in book 1, chap. 19, sec. 213,) "The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the State while they reside there; and they are bound to defend it while it grants them protection, though they do not participate in all the rights of citizens." If, according to the doctrine here laid down, the mere settlement and stay in a country where the laws precluded those who thus settled from becoming members of the civil society, gives the character of inhabitants to such persons, it clearly establishes the distinction between citizen and inhabitant, and shows that the latter appellation is derived from habitation and abode, and not from the political privileges they are entitled to exercise. Jacob's law dictionary defines "inhabitant" to be "a dweller or householder in any place, as inhabitants of the ville are householders in the ville. The word inhabitants includes tenants in fee simple, tenants for life, &c., tenants at will, and he who has no interest but only his habitation and dwelling." But should these authorities not be considered conclusive as to the definition of the word inhabitant, let the constitutions of the several States be examined, and see if, in some of them, the word has not received a construction exactly similar to what is here contended for. The constitution of New Hampshire contains the following declaration: "And every person qualified as this constitution provides, shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in the town, parish, and plantation where he dwelleth or hath his home." The

constitution of Massachusetts declares that, "to remove all doubts concerning the word inhabitant, in this constitution, every person shall be considered an inhabitant (for the purpose of electing and being elected into any office or place within this State) in that town, district, or plantation, where he dwelleth or hath his home." The constitution of New Hampshire was adopted in 1792, and that of Massachusetts in 1780; the former five years after, and the latter seven years before the formation of the constitution of the United States; and the word inhabitant is used in these constitutions in the same relation to the members of the State Legislature, that it is in the constitution of the United States to members of Congress. These constitutions were formed by conventions, in which were many of the most learned and practical statesmen of that day; and the declarations which they contain of the manner in which they intended the word inhabitant should be understood, ought to be considered as settling, conclusively, its true and legitimate meaning. Nearly all of the State constitutions require either inhabitancy or residence as one of the qualifications of Representatives in the Legislature; and in those of Delaware, Georgia, and Ohio, a saving clause is inserted in favor of such as may be absent on the public business of the State, or of the United States, thus clearly indicating the opinion that absence from the State divests the person of the character of inhabitant. The act of Congress of the 1st of March, 1790, entitled "An act providing for the enumeration of the inhabitants of the United States," affords another evidence of the same construction of the word inhabitant: the act provides "that the marshals of the several districts of the United States shall be, and they are hereby, authorized to cause the number of the inhabitants within their respective districts to be taken," &c., and by the same act, the marshal is required to make oath that he will cause to be made a perfect enumeration and description of all persons resident within his district, &c. By which it appears that, in the opinion of Congress, at that time, the inhabitants of the respective districts were the persons residing or living therein. The same principle is also recognised in the act of Congress "to establish the judicial courts of the United States," passed in 1789.

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the meaning of  
the word "in-  
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In the statement made by the Secretary of State, he refers to the practice of the Legislature of Massachusetts in cases embracing the same principles which are involved in the one under consideration; these, however, cannot be resorted to as precedents, unless it be made to appear that the question has been discussed and decided in that body. The existence of the cases, and suffering them to pass by without investigation, is no evidence that they were in conformity with the constitution of the State. To contest the election

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There is not an  
analogy on this  
subject be-  
tween a person  
employed by  
the Govern-  
ment at home,  
and a minister  
who represents  
the Govern-  
ment abroad.

A residence in,  
and not the ex-  
ercise of legal  
rights, consti-  
tutes one an in-  
habitant of a  
place.

of a person who is the choice of the people, is a very un-pleasant task, one that few will undertake, and from that cause alone persons not eligible may have been permitted to retain seats in legislative bodies. But it does not follow from this, that it was not an infraction of the principles of the constitution. But it is contended by Mr. Bailey that, as he was in the employ of the General Government while in this District, and had expressed an intention of returning to Massachusetts, he still remains an inhabitant of that State, but the committee are unable to perceive the force of the reasoning by which this position is attempted to be maintained. It is true that, by writers on the laws of nations, ambassadors and other agents who go out as such from one Government to reside near that of another, are considered as carrying with them the sovereignty of the Government to which they belong; that their rights as citizens are not impaired by such absence, and that children born in the houses they occupy are considered as born within the territory and jurisdiction of the Government in whose service they are. But the analogy between the cases is not discovered; the one is the case of an agent in a foreign country, not possessing the capacity, by residence in that country, to become one of its citizens, or to lose his allegiance to the country from which he comes; the other is that of a person employed in the service of the General Government within its territory, but without the limits of the State of which he claims to be an inhabitant. That which appertains to ministers of this Government, who represent the sovereignty of the nation in foreign countries, whatever it may be, cannot be supposed to attach to those in subordinate employments at home. The relation which the States bear to each other, is very different from that which the Union bears to foreign Governments; the several States, by their own constitutions, prescribed the conditions by which the citizens of one State shall become citizens of another; and over this subject the Government of the Union has no control; it would, therefore, be altogether fallacious to pretend that the bare holding of an appointment under the General Government, and residing for years in one of the States, should preclude the holder from being an inhabitant and citizen of such State, when, by its constitution and laws, he is recognised as such. How the expression of an intention to return at some future time to the State from which the person had come, can affect the citizenship and inhabitancy thus acquired, is impossible to comprehend. If citizenship in one part of the Union was only to be acquired by a formal renunciation of allegiance to the State from which the person came, previous to his being admitted to the rights of citizenship in the State to which he had removed, the expression of an intention to return would be of importance; but, as it is, it can have no bearing

on the case: the doctrine is not applicable to citizens of this confederacy removing from one State, and settling in another; nor can it, in the present case, be considered as going to establish inhabitancy in Massachusetts, when the fact is conceded that, at the time of the election, and for nearly six years before, Mr. Bailey was actually an inhabitant of the city of Washington, in the District of Columbia, and, by the charter of the city, and the laws in force in the District, was, to all intents and purposes, as much an inhabitant thereof as though he had been born, and resided there during the whole period of his life; and the refusal to exercise the rights of a citizen can be of no consequence in the case. It is not the exercise of privileges that constitutes a citizen; it is being a citizen that gives the title to those privileges. But there is one other circumstance attending this case that remains to be noticed, and which, it is presumed, cannot fail to explain the true character of Mr. Bailey's residence in the District of Columbia; the ground he assumes is that, although he was resident in the District, his domicil was his father's house in Massachusetts. Vattel says, (book 1, chap. 19, sec. 218,) "*The natural or original domicil* is that given us by our birth, where our father had his, and we are considered as retaining it till we have abandoned it in order to choose another. The *domicil acquired* is that where we settle by our choice." A question now presents itself for solution. What shall be considered an abandonment of the *natural or original domicil*? The reason why the father's house should be considered as the domicil of the son is, that, previous to the marriage of the children, they all constitute but one family, of which the father is the head, and his house their common home, so long as they choose to remain in it; but if the son absents himself for years, and, in the mean time, marries a wife, he then assumes the character of the head of a family himself; and the relation in which he before stood to his father's family is thereby entirely changed, and the original domicil must be considered as abandoned, and a new one established where he and his wife continue to reside. This is precisely Mr. Bailey's case; he had left his father's house in Massachusetts, and taken up his residence in Washington city, where he had remained for nearly six years, and where he was at the time of the election; he had married a wife in this city, and his habitation was with the family of her mother; can he, thus situated, have any reasonable ground on which to claim that he is an inhabitant of Massachusetts? The opinion is entertained by some, that the Government of the District of Columbia being rather of an anomalous character, a residence here would not carry with it the same consequences that would attend the settlement in one of the States of the Union; but the distinction, as applicable to the present case, the committee

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Of a natural  
and an acquired  
domicil.

Inhabitancy is  
acquired in the  
District of Co-  
lumbia in the  
same manner as  
in the States.

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have not been able to discover. It has also been suggested that, as the United States have the exclusive jurisdiction over the District, each State may be considered as possessing a part, and that although a person formerly a citizen of Massachusetts, or of any other State, may be resident here, yet he is not out of the jurisdiction of his own State. This is an argument more subtile than sound and conclusive. If that view be correct, the limits of the individual States will be found to be vastly more extensive than was ever heretofore supposed; because the same rule that will apply to the District of Columbia, will also apply to the whole of the territory purchased by the General Government, either from individual States or foreign nations. The doctrine is manifestly erroneous. The rights and interests of the individual States, in every thing of a national character, are merged in those of the General Government, the powers of which, within its sphere, are complete and indivisible.

The committee have carefully, and they trust impartially, considered the subject referred to them; they have examined it in every aspect in which it has presented itself to their minds; they have assiduously endeavored to ascertain the true intent and meaning of that part of the constitution of the United States by which the case is to be tested and decided; and they have presented to the House some of the reasons which have induced the conclusion to which they have arrived. They regret extremely that the duty which they owe to themselves, to the House, and to the nation, would not permit them to accord in opinion with the citizens of that portion of the State of Massachusetts immediately interested in the decision of this question; but believing, as they do, that the choice of that district was made in direct opposition to an express provision of the constitution of the United States, they respectfully submit the following resolution:

Opinion of committee against the sitting member.

*Resolved*, That John Bailey is not entitled to a seat in this House."

#### PETITION AGAINST SITTING MEMBER.

*To the honorable the House of Representatives of the United States in Congress assembled:*

The undersigned, being inhabitants of the district of Norfolk, in the commonwealth of Massachusetts, and duly qualified voters for a Representative of said district in the Congress of the United States, do respectfully petition and remonstrate with your honorable body against the return of John Bailey, Esq. as a Representative of said district, in the eighteenth Congress of the United States; and do respectfully pray that the said Bailey may not be admitted to a seat in said Congress as the Representative of said district, for the following reasons:



Because, by the first section of the first article of the constitution of the United States, it is provided that no person shall be a Representative, who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

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Petition against  
Mr. B.

Because, at the time when the election was held, at which the said Bailey was supposed to have been chosen, he was not an inhabitant of the commonwealth of Massachusetts, but then was, and for many years before had been, and still is, as the undersigned have been informed and verily believe, an inhabitant of the city of Washington, and District of Columbia; and, therefore, was not eligible as a Representative of said district, or any other district within said commonwealth, by the express letter, and in conformity with the true spirit and intention of the constitution of the United States.

Samuel D. Hixon.	George Johnson.
Nath'l Leonard, jun.	Isaac Johnson.
Oliver Johnson.	Joel Johnson.
Ransel Jones.	Luther Gay.
Hiram Jones.	Elijah Glover.
Thom. E. Clark.	Warren Johnson.
Charles Richards.	Jedediah Snow.
Willard Morse.	Thomas Glover.
Solomon Richards.	

*Certificates in behalf of the sitting member.*

In answer to the questions proposed to me by the Committee of Elections of the House of Representatives of the United States, in relation to Mr. John Bailey, I have the honor of stating—

Letter of J. Q.  
Adams, Sec'y  
of State.

*First.* That Mr. Bailey was appointed a clerk in the Department of State on the 1st of October, 1817.

*Second.* That his letter, resigning that appointment, was dated the 21st, and received by me the 23d of October, 1823. His resignation was immediately accepted, and an appointment made to supply his place.

*Third.* The duties performed by Mr. Bailey were those of a clerk, at the salary of 1,600 dollars a year, that being the highest salary, next to that of the chief clerk, allowed by law. They were different at different periods of his service. During the two or three last years, he had charge of the diplomatic correspondence, the most important and confidential portion of the duties of the office.

*Fourth.* A certificate of appointment is always given to the clerks in the department, appointed by authority of law. A copy of that given to Mr. Bailey is herewith delivered to the committee.

*Fifth.* Mr. Bailey's residence, at the time of his appointment, was in the State of Massachusetts, in the district which he has now been elected to represent. On tendering to him



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Adams.

the appointment of a clerk in the Department of State, I invited him, in the event of his accepting it, to repair to this city, to take upon him the performance of its duties, which he immediately did. His residence, during the time he held the office, was necessarily in this District; but he never, to my knowledge, exercised any of the rights of citizenship within the District. I always understood him as considering the State of Massachusetts as his home, and his residence here as merely temporary, and occasioned by his necessary attendance upon the duties of his office. At two different periods, he asked my opinion, whether I thought him *eligible*, as a Representative in Congress for the district in Massachusetts to which he belonged; and I answered him, that I did. Upon one, or both of those occasions, I mentioned to him the general reasons of my opinion, founded upon the common principle of national law, that the *animus revertendi*, or intention of return, constitutes the test of *domicil*, for the preservation of political rights to persons absent from home; and upon the practice, conformable to this principle, in the commonwealth of Massachusetts, examples of which were within my own knowledge.

JOHN QUINCY ADAMS.

WASHINGTON, *January 8, 1824.*

Appointment  
of Mr. B. in  
State Dep't.

In pursuance of authority, under the act of Congress passed on the eleventh day of September, 1789, entitled "An act for establishing the salaries of the executive officers of Government, with their assistants and clerks," I do hereby appoint John Bailey a clerk in the Department of State.

Given under my hand, at Washington, this first day of October, 1817.

JOHN QUINCY ADAMS.

DEPARTMENT OF STATE,

*Washington, 19th January, 1824.*

SIR: In answer to the questions of Mr. Bailey, enclosed in your letter of the 19th instant, I have the honor of stating as follows:

*To the first.* That I returned to the United States, from Berlin, in September, 1801, after an absence of seven years. I was elected a member of the Senate of Massachusetts in April, 1802.

*Second.* Mr. Eustis returned from the Netherlands in the summer of 1819.

*Third.* Mr. Gore returned to the United States, from England, in 1804, and was elected Governor of Massachusetts in 1809.

*Fourth.* Mr. Benjamin Hichborn and Gen. William Hull were both members of the Senate of Massachusetts, in the year 1802, with me. They had both, within five years before that time, been absent in Europe upon their private concerns. Mr. Hichborn's absence had been of several years' continuance.

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I am, with great respect, sir,  
Your very humble and obedient servant,  
JOHN QUINCY ADAMS.

J. SLOANE, Esq.  
*Chairman of the Committee  
of Elections of the House of Representatives.*

I have been acquainted with Mr. John Bailey from my arrival in this city, in January, 1818, to the present time. He has resided in a public hotel, with occasional absences on visits to Massachusetts, until his marriage in this city, which took place about a year since ; at which time he took his residence with the family of his wife's mother, where he still remains.

Certificate of  
Mr. Bulfinch.

With respect to the exercise of the privileges of a citizen, I know no act which, in this District, can be so entitled, unless it be the voting for city officers at the annual elections, or holding an office in the corporation. I do not know that Mr. Bailey has voted in any case for city officers, and believe that he has never held any office of the corporation. I do not know what is the interest or property which Mr. Bailey has in Massachusetts, the supervision of which he claims as constituting his inhabitancy there.

CHARLES BULFINCH.

Sworn and subscribed before me, the 13th January, 1824.  
J. SLOANE, *Chairman.*

This report was read, and laid on the table. On the 1st March, *Ordered*, That said report be committed to the Committee of the Whole House.

Proceedings in  
Committee of  
the Whole.

From the 16th to the 18th of March, inclusive, the House was occupied chiefly in Committee of the Whole with the discussion of the points arising out of the preceding report and the accompanying evidence and statements. Mr. Bailey, the sitting member, made a speech in reply to the reasoning of the committee in their report, and was seconded by Messrs. FULLER, of Massachusetts, BRENT, of Louisiana, J. T. JOHNSON, of Kentucky, WOOD, of New York, W. SMITH, of Virginia, MALLARY, of Vermont, and many others ; and the principles of the report were sustained in the speeches of Messrs. STORRS, of New York, RANDOLPH, CAMPBELL, of Ohio, and HALL, of North Carolina.

Mr. BRENT moved to amend the committee's report by striking out from its concluding resolution the word "*not*,"

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so as to give it an affirmative character, declaratory of the sitting member's right to the seat. This proposed amendment was negatived in Committee of the Whole, by a vote of 105 to 55.

Mr. COBB, from the Committee of the Whole, reported the resolution contained in the report of the Committee of Elections without amendment; and, on the question to concur,

Mr. COOK moved to recommit the report; which having been disagreed to,

Mr. McDUFFIE offered the following amendment: Strike out all after "Resolved," and insert, "That it is the opinion of this House that John Bailey came to the city of Washington in 1817 with the intention of returning to the State of Massachusetts, and that the said intention has continued to the time of his election to this House.

"Resolved, therefore, That he is entitled to his seat in this House."

Mr. Bailey not  
entitled to the  
seat.

The consideration of this amendment was precluded by a call, which was made and sustained by the House, for the previous question; which being put, there appeared in favor of the resolution contained in the report 125, and against it 55 votes;\* so that John Bailey was declared not entitled to his seat.

#### STATEMENT OF MR. BAILEY.

##### *To the Committee of Elections, H. R.*

Mr. Bailey's  
letter to the  
committee.

GENTLEMEN: It was suggested, when I first had the honor of meeting you in session, on the 7th instant, that the true question in my case was the question, *quo animo*? What was my *intention* relative to my residence at Washington? Was it intended to be *permanent*, or only *temporary*? If the latter, my inhabitancy in Massachusetts remained; if the former, it was lost.

I beg leave to state some facts bearing on the question, and to add a few remarks.

It is proper to remark, that those provisions of our constitutions and laws which require inhabitancy as a qualification for holding office, have, in all parts of the country, it is believed, received a liberal and not a rigid construction. And it is just that there should be a liberal construction, since there is scarcely the slightest danger of any extensive evil arising from it. We find that, in those States where members of Congress are chosen in districts, it is very rare, indeed, that a person is elected who is not an inhabitant of the *district* in which he is chosen, though such inhabitancy is not at all a requisite. Equally rare, probably more so, would be the election of a person not an inhabitant of the

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\* Mr. McDuffie having, at his request, been excused from voting.

State, even if the constitution of the United States had not made inhabitancy a requisite.

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The reason which led our predecessors to establish inhabitancy so generally as a requisite for holding office, was probably this: They had seen the enormous abuses which had taken place in *England*, connected with the election to Parliament of persons who were almost entire strangers to those whom they represented. Those members were very often the devoted, and often the pensioned supporters of a powerful ministry. In their minds, therefore, the ideas of non-inhabitancy and of ministerial influence were intimately associated. Hence, the provision of inhabitancy was almost universally engrafted into our constitutions; notwithstanding our more equal representation, the greater number and intelligence of our electors, and the idea, whether true or false, that each section of our country has its peculiar interests, rendered such a provision almost useless.

Mr. Bailey's  
letter, continued.

This view of the probable origin of a provision, which in this country seems unnecessary, shows that the liberal construction which by universal consent it receives among us, is a perfectly just and proper construction. The right of suffrage and the settlement of paupers are construed more rigidly, and properly so. A loose construction of the former would tend to defeat the will of a majority of the people; and, of the latter, would impose on them improper pecuniary burdens. But, in the case of eligibility, neither of these evils can result.

This liberal construction is peculiarly proper in relation to the *District of Columbia*. Stronger evidence of an intention to become a permanent inhabitant of it than of any other part of our country, ought to be required before such intention is presumed. It is subject to the *exclusive legislation* of Congress; of a body which is the Legislature of Massachusetts as well as of the District of Columbia. By coming to this District, I came under no new jurisdiction—the jurisdiction of no Government under whose jurisdiction I had not previously lived. Suppose I had been in the army or navy of the United States, and been stationed solely and for several years at an island in Boston harbor, subject to the exclusive legislation of the United States: is it believed that I should have ceased to be an inhabitant of Massachusetts? Yet the jurisdiction is precisely the same. And though the inhabitants of the District of Columbia have a right to elect charter officers, even this pittance of a right is held at the mere sufferance of Congress. That body can at any moment revoke the right.

There are several points in the laws regulating the District of Columbia, (such, for example, as the one giving to aliens the power of holding real estate,) which prove that this District was intended as a great thoroughfare of the nation, an estate in joint tenancy, a spot which should form, in

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Mr. Bailey's  
letter, continued.

a certain sense, a part or appendage of every State in the Union, and which is, therefore, placed under the exclusive jurisdiction of the common Government of these States.

Thus, the very condition and uses of the District of Columbia show the propriety of a liberal construction of the doctrine of inhabitancy, in relation to persons employed in it by the Government.

Another ground of liberal construction is the fact, that there is no other person claiming the seat which, it is alleged, ought to be vacated. Were there such a person, liberality to the sitting member might be injustice to him. But none such is found. To vacate the seat would necessarily leave the district without representation for a portion of the session. A liberal construction, therefore, gives effect to the right of representation, without injustice to a rival candidate.

If any thing could further show the propriety of a liberal construction in this case, it would be the *clandestine* and *novel* origin and progress of the remonstrances before the committee, tending to prove that the whole complaint originated, and has been pursued, from *personal motives*. Several weeks before the meeting of Congress, a large number of blank remonstrances were printed, and circulated, *anonymously*, through the post office, addressed to the municipal officers and other persons in the twenty-six towns into which the district is divided, with a manuscript request on the margin to those persons to obtain signatures, and send them to some member of Congress from the State.

About a week after the commencement of the session, two of these papers, together containing twenty-six signatures, were received by a member, in an *anonymous* letter, requesting him to present them to the House; and they were presented and committed before I knew of their existence. Though this letter had only a fictitious signature, the member who received it is confident that he knows the handwriting. And what shows that the remonstrances were got up from personal motives, and not from zeal to preserve the constitution inviolate, is the fact that the name of the undoubted writer of this anonymous letter does not itself appear on either remonstrance. Another fact is, that, at the election, the writer of this anonymous letter received nearly the same number of votes in his own town, as there were names on the remonstrances, which were also from the same town.

When, therefore, we consider that even the genuineness of the signatures is questionable, as they came through an anonymous, and therefore irresponsible channel; that, waiving this objection, still there are but *twenty-six* remonstrants, equivalent to one elector, in each town, in a district which has several thousand electors; that they are but few more in number than the votes given at the election for the person who obtained and forwarded the signatures, and that they

merely express their belief that the person elected was not an inhabitant of the State, sustaining the allegation by no proof whatever, while a contrary belief was expressed, by a thousand electors, in the fact of his election: when we consider all these circumstances, we see much to convince us that these remonstrances originated in personal motives, and very little to convince us that papers of so informal and questionable a character are entitled to great respect from the House or its committee.

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letter, continued.

One of the oldest, most experienced, and best informed members of the House, on hearing the circumstances, expressed his belief that *no instance* could be found in which papers of such a character were ever even *received* by the House. If they should not only be received, but be made the ground of the dismissal of a member from the House, it would be still more remarkable.

These circumstances, aided by the general reason in favor of a liberal construction before noticed, render it proper that the clear and undeniable will of the people of the district should not be set aside on any other than the most unequivocal grounds. That such grounds do not exist, is, it is believed, most manifest.

The question is, was my residence in Washington intended by me to be permanent, or only temporary? If permanent, my inhabitancy in Massachusetts was lost; if temporary, it was not lost. Mere residence, of itself, cannot destroy inhabitancy. This all admit. Innumerable examples and authorities prove it. Before we infer the loss of inhabitancy, we must show some facts indicating intention of permanent residence.

The testimony of Mr. Adams, that he always understood me as considering Massachusetts my home, and my residence here as merely temporary, joined with the testimony of both Mr. Adams and Mr. Bulfinch, (witnesses who were not called at my request,) that they never had knowledge of any exercise by me of the political rights of a citizen of the District of Columbia, is satisfactory proof in my favor, unless some opposite proof can be brought to countervail it.

No such proof, I am sure, can be found. On the contrary, my whole course, during my residence here, has been in entire conformity to this testimony. *And I declare, solemnly and distinctly, that it was always my intention to continue an inhabitant of Massachusetts.* In the civil concerns of the District of Columbia, I have never exercised a single privilege, or been required to perform a single duty of an inhabitant; have never held a local office, or given a vote, or even had the right of voting, and have never owned any real estate, or paid or been assessed in any tax whatever. I was at a public hotel till within less than a year before my election, when I was invited to reside in a private family as long as it should be pleasing, keeping, while there, no house,



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table, or domestics, but living as one friend would live while on a visit to another friend. On repeated occasions, in conversation and letters, I have expressed the temporary nature of my residence here, and my most intimate friends have distinctly so understood it.\* My library, consisting of between seven and eight hundred volumes, and constituting nearly all my visible property, I left chiefly (taking with me only a small part for temporary use) in the house of my father, where I had resided, and where they still remain for my use on my return. There, also, I have spent a portion of nearly every autumn previous to that in which I was elected.

Of these facts I most freely challenge contradiction. They cannot be contradicted with truth. They are already corroborated by testimony now before the committee. Unless, therefore, some testimony should be obtained, which I am sure cannot be obtained from honest persons, the conclusion is irresistible, that my intention was to make a merely temporary residence. And I venture to say, that if inhabitancy is not retained by an absentee for a term of years, under such circumstances as these, it would be impossible for him to retain it under any circumstances whatever.

That the inhabitants of Norfolk district considered me as also an inhabitant, is proved by several facts. A few days before a meeting of citizens to nominate a candidate, I was written to, and asked if I were willing to be supported as a candidate. The reply was affirmative. The meeting was probably the largest ever held in the district on a similar occasion, every town having been represented, and the nomination was supported by nearly three-fourths of it. And, at the election, though there were several candidates, the successful one had a decided majority over all the others, in coincidence with the principle governing elections in the Eastern States. These facts occurred, too, in a State in which there has never been known a single instance of the election to Congress of a person who was not an inhabitant of the very *district* in which he was chosen. They clearly show the opinion of that portion of the Union, who probably best knew the nature of my connexion with it, and who certainly were most interested to prevent an improper choice. They undoubtedly supposed that a person who was a native of that district, whose immediate connexions nearly all resided in it, and who had represented a portion of it in the State Legislature for several years, could not be held to have expatriated himself, without some clear and unequivocal proof, of which none whatever existed. They had seen me go to a neighboring State, Rhode Island, and spend four years at college in my education, and then return to my native district. They had seen me, at the end of a year, revisit the same college,

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\* Proofs of this have been produced; but, as the committee have since abandoned the ground that the question is that of *quo animo*, the documents are not printed, as was intended.

and spend six years there as one of the instructors, and then return again to my native district. And though they had, at the time of the election, seen me employed nearly as long by the Government at Washington, as I had been, in the second instance, in Rhode Island, they did not doubt that my attachment to my native district continued, and that my avowed intention to return was sincere; nor could they, for a moment, doubt that the House of Representatives of the United States would give the same liberal construction of the doctrine of eligibility, which all preceding Houses, and all our State Legislatures, except when under violent excitements, had uniformly given.

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letter, continued.

The principle of my eligibility is supported by numerous precedents. Precedents, on this point, though not abstractly and absolutely conclusive, are yet of great weight. They are important as guides of action to individuals. Suppose a person elected to a seat in Congress, under circumstances creating some doubt of his eligibility; and suppose he holds, at the time, an office incompatible with such seat, which he must resign if he accept the latter. He looks to precedents in similar cases, and finds that they all sanction the belief of his eligibility, and he accordingly resigns his previous office, and with it his immediate means of living, on the faith of these precedents. It would be plainly improper to set aside all these precedents, and eject the member from his seat, without the clearest and strongest reasons.

It is admitted that no precedents are found of cases exactly similar to the present. In truth, no two cases can ever be found exactly similar. The object then is to find the cases most resembling the one in question. These cases, in every instance that has met my view, without an exception, are in my favor. Not a single case, resembling the present, has been decided unfavorably.

The constitution of the United States declares that a person elected a member of the House of Representatives must be an inhabitant of the State in which he is chosen; leaving each State, it is presumed, to determine what shall be its own terms of inhabitancy. What are the terms of inhabitancy in Massachusetts?

The constitution of Massachusetts, having been formed before the constitution of the United States, and even before the completion of the old confederation, does not provide for cases of employment in the service of the United States; nor do its laws, it is believed, make any such provision. In practice, however, many cases have occurred: and they all, without one exception, speak the same language, that of liberal construction.

The present Governor of Massachusetts resided several years in Europe as a minister of the United States; and in about four years after his return was elected the Governor, though the constitution requires inhabitancy for seven years

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next preceding the election. Mr. J. Q. Adams resided seven years in Europe, in a similar capacity; and in a few months after his return was elected to the Senate of Massachusetts, though the constitution requires inhabitancy for five years next preceding.

It has been said that the case of a minister of the United States is not applicable to the present question, as he is said to "carry his country with him." It is scarcely to be believed that, at the present day, such a technicality, a mere legal fiction, will be seriously urged to defeat the clearly expressed will of the people. The utmost that can be said in favor of the minister is, that he is exempt from the ordinary operation of the laws of the country in which he resides. But it might be doubted whether the exemption is much greater than has been enjoyed in the case in question. But, suppose the exemption greater: how is it possible that a little more or less of such exemption shall have so important a bearing on a person's political rights, that one shall retain his inhabitancy five thousand miles distant from his residence, while another loses his inhabitancy at a distance of five hundred? The distinction is indefensible.

It has been said that the tenure of office is different. In what consists the difference? One is appointed by the President and Senate, the other by the head of a department. Both are removable at pleasure: both have the privilege of resignation: both are subject to the abolition of office: and both continue for life, when neither dismissal, resignation, nor abolition of office takes place. There is, therefore, no difference in the tenure of office, that can create a difference of political rights.

It has been said that one has an appointment of *honor*, while the other has not. Under a *republican* Government, this distinction seems not at home. It cannot be correct. The *grade* of the office cannot vary the *rights* of the man.

It may be said that we are bound to presume in a minister an intention of returning when he gives up the duties of his station; as his residence afterwards in a foreign country would be attended with fewer political privileges than he would enjoy in his own country, as well as by a deprivation of the society of his relations and friends. The same intention we are equally bound to presume, in the case of giving up employment at Washington; as a further residence in it would be attended by a similar loss of former society, and by a still greater diminution of political privileges, a mere shadow of privilege being all that remains.

Under every aspect of the subject, therefore, no reason presents itself for viewing the case of a minister as different from the case in question.

But other cases than those of ministers are found. Mr. Gore, after having resided many years in England, as a commissioner under our treaty with Great Britain of 1794, re-

turned in 1804, and was elected Governor of Massachusetts in 1809, notwithstanding the requisition of inhabitancy for seven years next preceding. He was not a minister, and, therefore, carried no country with him. Suppose his election had been contested on the fact of his absence; what would have been the reply? It would have been said, and said justly, that absence, without any evidence of an intention of making it permanent, could not destroy previous inhabitancy. But no contest was attempted. Mr. Hichborn returned from Europe, after an absence of several years on *private* business, and was elected to the Senate of Massachusetts in 1802, long before the expiration of the five years. And in 1818 Mr. Crowninshield was strongly supported as a candidate for the office of Governor, without a question of his eligibility being made, though he was at that time, and had been for several years, residing at Washington, and discharging his duties as Secretary of the Navy.

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The person whose seat is now contested, returned to his native town in October, 1814, after residing several years as an instructor in the college at Providence, R. I. In May, 1815, he was elected to represent that town in the State Legislature, though inhabitancy in the town for one year next preceding the election is required. Some of his political opponents took the advice of an eminent lawyer, on the question of contesting the election. The advice was against it, and nothing was done. This is a stronger case than the present, as the employment was private, and not by the Government. But as it was in a literary institution, unaccompanied by civil duties or rights, it was deemed that inhabitancy in his native town was not destroyed by it.

These instances prove that if the present case were to be decided by the rules and practice of Massachusetts, no doubt of eligibility would exist. Not a single precedent to the contrary is found.

If it be said that it must be decided by the rules and practice of the United States, and not of the particular State in which the person is chosen, the precedents are equally strong. Not one is found unfavorable.

•We find a member of the present Congress holding his seat uncontested, though he was elected while residing in Spain as minister of the United States; though he had been a resident of that country for several years previous; and though his family were residents of the District of Columbia for the first two years of that period, and of Spain for the remainder.

We find Philip Barton Key holding his seat many years ago, under circumstances which prove that a liberal construction of the doctrine of inhabitancy is the practice of Congress.

We find that, recently, Capt. Hull, of the navy, who was at the time, and had been for eight years, a resident of

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nued.

Charlestown, in Massachusetts, was styled, in the proceedings of a court of the United States, as of Connecticut, which was his native State; and that a plea in abatement, which was at first filed, was afterwards abandoned as untenable.

We find the heads of departments, though residents of the District of Columbia, universally considered as inhabitants of the States, respectively, of which they were inhabitants before appointment. We find Mr. Crawford nominated by the President to the Senate, and commissioned as of Georgia, though he had for nearly two years before been a resident of the District of Columbia. We find Mr. Rush nominated and commissioned as of Pennsylvania, though he had been for several years a resident of the District of Columbia, as Comptroller of the Treasury. And, what is more emphatically to the point, we find Mr. Pleasanton, to whose situation in the Department of State I succeeded, nominated and commissioned as of Delaware, though he had been for *sixteen* years a resident of the District of Columbia.

We find our greatest and most experienced statesmen, men who stand in the front rank of past and present official stations, as well as of intelligence and integrity, expressing freely, and distinctly, and unitedly, the opinion that simple employment at Washington does not at all destroy previous inhabitancy elsewhere.

We find in the constitution of *Kentucky* the following principle: "Absence on the business of this State, or the United States, shall not forfeit a residence once obtained." The same principle is recognised, to a greater or less extent, by the constitutions of *New York, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Tennessee, Georgia, Louisiana, Mississippi, and Alabama*. The general election law of *Virginia* has the following enactment: "No person inhabiting within the District of Columbia, or elsewhere, not within the jurisdiction of this commonwealth, shall be entitled to exercise the right of suffrage therein, except citizens thereof, employed abroad in the service of the United States, or of this commonwealth, and whose foreign residence is occasioned by such service."\* This law is more specially deserving of notice, as it respects not eligibility, but the right of suffrage, which is universally, and very properly, construed more rigidly than the former.

We find, in the constitution of the United States itself, the doctrine plainly implied, that inhabitancy and actual residence are entirely distinct. That constitution requires that a Senator or Representative in Congress shall be an *inhabitant* of the State he shall represent. But, in the case of President, it requires that he shall have been fourteen years a *resident* within the United States. Uniformity would have demanded either that *residence* should be the requisite for a Senator

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\* Revised Code of Virginia laws, vol. 1, page 156.

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or Representative, or that fourteen years of *inhabitancy* should be the requisite for a President. But, as the high importance of the trust reposed in a President of the United States, makes long familiarity with the nature and operations of our institutions indispensable, and as a person might be for fourteen years an *inhabitant* of the United States, in the legal sense, without being an actual *resident* for half that period, it was judged proper that actual *residence* should be the test. And as, on the other hand, some of the most intelligent inhabitants of a State may be temporarily absent in the service of their country at the time when a Senator or Representative is to be elected, it was judged proper that *inhabitancy* only, and not actual residence, should be the test.

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letter, continued.

This view is supported by the journals of the convention of 1787. We there find that, in the early draughts of the constitution, the qualification for a Representative or Senator was *residence*, but afterwards changed to *inhabitancy*, while that for a President was at first *inhabitancy*, but afterwards changed to *residence*. The fact is remarkable, and shows that the framers of the constitution made a clear distinction between *inhabitancy* and mere *residence*.

These facts, showing the practice of Congress, of the Executive, and of the courts, the opinion of our greatest and wisest men, and especially the general will of the nation, as expressed in their constitutions and laws, comprise a body of public sentiment, which is irresistible, while not a single important fact is found favoring the opposite doctrine. If these facts be added to the positions already established, that the great question is that of *intention*, and that my intention was obviously that of a temporary residence, it is believed that the committee and the House will be unanimous in the opinion that my eligibility is established.

If, however, any doubt remains, it must be removed by one rule of decision, which in a free Government should never be disregarded. *The distinctly expressed will of the people ought never to be set aside on a merely doubtful principle.* The principle should be *clear indeed*, which is vindicated at the expense of this will. As I am sure that the principle is *not* thus clear *against* me, I cannot, for a moment, doubt that the decision of the committee and the House will give the will of the people its due effect.

These remarks are grounded on the point suggested when I had the honor of meeting the committee before, that the great question to be decided is the *intention*. If any other point be deemed important, I respectfully request that I may be informed.

JOHN BAILEY.

*January 28, 1824.*



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1st Session.*Postscript.*Further re-  
marks by Mr.  
Bailey, the sit-  
ting member.

**GENTLEMEN:** The preceding remarks were grounded on the understanding that the real question before the committee was the question, *quo animo*? Yesterday, however, I was informed, for the first time, that there was a change of opinion in the committee, and that they now considered that question as not applicable to my case. Though I am still persuaded that that is the real and only question, and am fortified in this persuasion by the highest authorities, all concurring to establish the point, yet some observations will be made in reply to several other points.

1. It is said that though I am unquestionably a *citizen* of Massachusetts, yet I am not an *inhabitant*, there being a distinction between the meanings of those two terms.

Perhaps it would be difficult to draw very clearly this distinction, since the terms appear to be used quite synonymously in the articles of the confederation, in many of our State constitutions, and in numerous works of high authority. But suppose the distinction exists. I have attempted no argument whatever, on any supposed identity of their meaning. I have adduced precedents, and added some observations, to show that I am an *inhabitant* of Massachusetts, according to the constitutional sense of the term. If the precedents and observations have any force, they tend to prove my inhabitancy, without any attempt to blend this question with that of citizenship.

2. It is said that the constitution of the United States required inhabitancy of the State, in order to prevent the influence of the State Governments from being merged in that of the General Government.

We will not stop to enforce the remark, that this reason applies as strongly to all our foreign ministers as to the case in question. The conclusive reply to the proposition is, that nearly all the States, whose constitutions have been framed since that of the United States, have expressly provided that absence from those States in the service of the General Government shall *not* be a disqualification for certain given offices. And *Virginia*, whose zeal in defence of the rights of the States is second to none, has established the liberal principle that its citizens shall enjoy even the more rigidly construed right of suffrage, though residing in the District of Columbia, provided such residence is occasioned by their employment in the service of the United States.

It would be a singular spectacle to see the General Government become the champion of the rights of the States, in opposition to the explicit regulations of the States themselves.

3. It is said that a person, who is for years absent from his home, loses his inhabitancy, unless he leaves there something which requires his attention or supervision.

It may properly be asked, in the first place, if this be not

a perfectly arbitrary principle, unsupported by any authority whatever.

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It may be said, in the next place, that the position is erroneous. No such fact is *essential*. It is merely one of the many evidences tending to prove an intention to return. The intention may often, however, be sufficiently proved by other circumstances, where this does not exist.

Remarks by  
Mr. Bailey.

In the next place, it may be replied, that the fact does exist in the case in question. Nearly all my library was left; which fact is perfectly unaccountable, except on the ground that I intended to return. Though this may seem trifling property to those whose fortunes are splendid, yet, as it happened to be the owner's all, its humble nature is as significant in its application to the present question, as would be the treasures of the affluent.

4. It is said that merely an expression of an intention to return to one's former residence is not sufficient to sustain inhabitancy.

This has never been contended. The principle asserted is, that when such intention has been expressed, and when the whole train of circumstances unite to corroborate that expression, particularly the mere disconnexion with the civil concerns of the temporary place of residence, then, previous inhabitancy is not lost.

5. It is said that inhabitancy, in the meaning of the constitution, is, *the mere fact of living* at a place; as a head of a department lives at Washington; as a minister of the United States lives at a foreign court; or, as a member of Congress lives at Washington during the session.

That such a doctrine as this should be seriously entertained, is indeed remarkable. Its hostility to all known authorities and precedents, to the express provisions of our State constitutions, and to the clear opinions of our soundest statesmen and jurists, is too glaring for comment.

We must then revert to the original question, and the real question in the case—Did I take up my residence here, with the intention of making it my permanent residence, or not? To attempt to evade this question, and substitute some other, the fiction of our own minds, is doing injustice to the rights of the community.

If we go to foreign authorities, (though it is doubted whether the question be not too purely American,) we find the following:

“The *domicil* is the habitation fixed in any place, with an intention of always staying there. A man does not then establish his domicil in any place, unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration.” *Vattel*, b. 1, ch. 13, sec. 218.

If we take the highest American judicial authority, we have this:

“*Domicil* is a residence in a country, with the intention,

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either tacitly or expressly declared, of making it a permanent place of abode."

"If a party has made no express declaration as to his intention of permanently residing in a country, his acts must be attended to, as affording the most satisfactory evidence of his intention." 8 *Cranch*, 278, 279.

Authorities might be multiplied to prove that this *intention* has always been held to be the true test of inhabitancy. All our tribunals, whether legislative or judicial, prove it. To create a *new* principle for the present case, would be manifestly unjust.

JOHN BAILEY.

*February 17, 1824.*

For the more entire elucidation of the principles maintained and enforced, on different sides of the question which were raised in this case, such of the speeches delivered, as are found reported in the newspapers of the day, are here subjoined.

Speech of Mr.  
Bailey.

Mr. BAILEY said, I feel peculiar embarrassment in offering my views of the present subject, from a conviction that I shall be unable to do it justice. Even if my health were perfectly good, I should labor under the disadvantage of being unused—totally unused—to public speaking. This misfortune, joined with a very feeble state of health, renders it impossible that I should do justice to a subject in which I cannot avoid feeling great interest. I hope, therefore, that this committee will do me the favor to believe my cause really much better than my representation of it will be.

It cannot escape observation that the question now under consideration is not an ordinary instance in the history of contested elections. Nearly all such questions have for their object to ascertain what is the real will of the people. In the present case, the object is to discover if there be any mode of *defeating* the will of the people.

On this subject one rule, it is believed, may be laid down with perfect truth; and it is stated with the more confidence, since I have the authority of the chairman of the Committee of Elections for its correctness. In the discussion of a late case, the contested election from New York, which, we all remember, rested mainly on the correctness or incorrectness of the decision of the commissioners of election in that State respecting a single vote, that gentleman remarked that, in order to set aside this decision of the commissioners, it was not sufficient to raise a doubt on the case; there must be made out a clear and "positive" case against the decision. This remark, Mr. Chairman, I heard with particular pleasure; both because it was a just remark, and because I hoped that not only that gentleman, but this House, would extend the same just and liberal principle to my own case. The truth of the principle cannot be doubted. And if it applies to the decision of the commissioners of an election, with

how much more force does it apply to the expressed will of the people of a whole district? A strong and positive case indeed ought to be made out before such an expression of the will of the people is set aside. And I undertake to show that the report of the Committee of Elections has entirely failed to make out such a case.

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Speech of Mr.  
Bailey, continu-  
ed.

In contested elections, arising under either the General or State Governments, the practice has been to give a liberal construction in favor of the rights of the people. This practice, it is believed, has never been departed from, except in times of great party heat and excitement. In the present times, it is trusted that no such excitement will be found to exist. It is not to be denied that efforts have been made, out of doors, both at the time of the election, and more recently, to give a party turn to the case now under discussion. But I trust that no such efforts will avail; that this House will permit no such feelings to mingle in the discussion. I appeal with confidence to this House, to take that liberal view of the privileges of the people, which has so universally prevailed on questions of this nature.

For the first time, within my knowledge, we have a departure from this liberal construction in the report of the Committee of Elections now before you. The principles of this report are indeed new; they are wholly unprecedented. In no authorities, either legislative or judicial, do we find the principles here avowed. Inhabitaney, according to this report, means purely and simply "*locality of existence*;" the mere fact of being in a place. This definition, I venture to say, was never before heard of, and is at war with the spirit of all our free institutions.

When I was elected to this House, in September last, I was employed in the Department of State. The question occurred, Shall I resign that employment, and accept a seat in this House? This was an interesting question to one who depended for his living on his own exertions. In this country nearly all of us are compelled to pursue some course of honest industry for our support; and, Mr. Chairman, it is most fortunate for the country that this necessity is so general. To a person thus situated the question presented for decision was an important one. Doubts I knew were entertained of my eligibility. I extended my inquiries to all analogous cases within my reach; and they were all, without exception, in favor of my eligibility. I learnt the opinions of some of our first citizens on this point, and they too went to the same result. I have learnt, accidentally in most cases, the opinions of at least twelve of the very first statesmen and jurists of the nation; and, what is most remarkable, those opinions are perfectly unanimous; not one of the whole number is opposed to what appears to me to be the truth of the question. I do not mention this fact under the impression that such opinions should have a binding force with this House. With this House, and this House alone, the constitution has

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left the full control of questions like the present. But the opinions of such persons are entitled to respectful consideration. And it is natural to suppose that they must have had decided weight with me, when determining in my own mind the question of acceptance.

Before examining the principles of the report of the committee, I beg leave to notice several errors in it, in point of fact.

The report (p. 6-7) says, "it is contended by Mr. Bailey, that, as he was in the employ of the General Government while in this District, and had expressed an intention of returning to Massachusetts, he still remains an inhabitant of that State." I certainly never contended, Mr. Chairman, that I remained an inhabitant of Massachusetts merely from the two facts here stated. But I did contend for it from those two facts, supported by another most important fact, that this constant declaration of my intention of returning, was confirmed by my whole course of conduct while I was employed in this District; by my total disconnexion with the civil affairs of this place. We all know the irresistible propensity of freemen to take part in the civil concerns of those communities in which they intend to make their permanent abode. My entire abstinence from taking such part in this District most strongly corroborates my uniform declaration that I intended it as merely a temporary abode.

The report (p. 7) further says, "The fact is conceded that, at the time of the election, and for nearly six years before, Mr. Bailey was actually an inhabitant of the city of Washington." The obvious understanding of this remark would be, that this fact had been conceded by me. Such, however, is not the fact. No such concession has ever been made by me.

[Here the chairman of the Committee of Elections rose to explain. He said that the committee were obliged to state the points of Mr. Bailey's defence from recollection merely, as it had never been put into their hands in writing, but merely read to them. Mr. B. replied that his defence was read to the committee on the 29th of January, from a rough draught; that he was to have given in a correct draught at the next meeting of the committee, on the 4th of February; but that in the mean time, on the 2d February, he learnt from the committee that they had determined on their report. This fact, together with a desire to incorporate some remarks on several points subsequently suggested by the committee, was the reason why the corrected draught was not submitted to the committee.]

The report (p. 8) also says that I assumed the "character of the head of a family." This is entirely incorrect, unless there be some peculiar and technical meaning in the phrase different from its common meaning. I have been accustomed to consider that a person, in order to be the head of a family, must either own or rent a house; or must have the

government of the domestics of a family; or must regulate its pecuniary expenses, or at least furnish the means. Some one, at least, if not all of these incidents I have always supposed necessary to constitute the head of a family. Yet not a single one of these incidents has attached to me during my residence in this District.

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These errors in point of fact, in the report before us, I have thought it necessary to notice in the first instance, as they may have had an unfavorable influence on the minds of some members of this House. If they have had such influence with a single member, it is hoped these remarks will correct it.

I will now proceed, Mr. Chairman, to notice some of the points and arguments contained in this very extraordinary report; and will show not only that many of them are founded in error, but that many are wholly inconsistent with each other.

In the second paragraph of the report it is stated that the subject under consideration is "one of great national consequence." This remark could not certainly be intended to apply merely to the individual seat which is now contested, but must be meant to refer to the general principle involved in the question under discussion. Is the remark correct, even in this respect? Our present National Government has been in operation for thirty-five years. At the end of thirty-five years *one case* has occurred, in which a person, residing at the seat of Government, has been elected a member of this House; perhaps in thirty-five years more *another case* may occur. Is this an alarming prospect? Is the case one of such "great national consequence?" I will agree with the chairman of the Committee of Elections, that if another case should occur within the next thirty-five years, and we should both have seats on this floor, I will join him in a vote in favor of an amendment to the constitution, which shall expressly exclude from this House all persons not *actually resident* in the States in which they are chosen. But I will whisper in the ear of that gentleman, that if he feels alarmed lest the purity of this House should be destroyed, and is anxious for a remedy, there is an amendment which might be made in the constitution far more efficacious than the one proposed. Let the constitution be amended *so as to prohibit Executive appointments from being made from this and the other branch of Congress*. If there is real danger of Executive influence in Congress, here is a field more worthy of the gentleman's labor than the one in which he has been industriously engaged.

In the same paragraph we have an attempt to elucidate the meaning of the word inhabitant, by adverting to the supposed state of parties in the convention which framed the constitution of the Union. It is alleged that in this convention there were three parties, zealous in support of their respective favorite theories; one in favor of a consolidated Govern-



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ment; a second in favor of a confederation not differing widely from the old; and a third in favor of an intermediate form. No authorities are cited in support of these alleged historical facts. But suppose the statement perfectly correct: is not the inference from it precisely the reverse of that drawn by the committee? The committee infer, that since the second party were zealous in "sustaining the distinctive character of the several States," and in limiting the powers of the General Government, therefore we are bound to give a rigid interpretation of the word inhabitant. To me this appears completely a *non sequitur*. Before this inference can be legitimately drawn, it must be proved that this party prevailed in the convention, and modelled the constitution according to their own views. But this is not proved: the fact is known to be the reverse. So far were they from this victory, and so erroneous did they consider the principles of the constitution, that some of them refused to the last to sign it; and others were strenuous in advocating amendments which should restrain what they deemed the dangerous latitudinarian powers of the General Government. So true is this, that the report itself admits that "it was with much *reluctance* that they finally agreed to unite in that spirit of mutual *concession and compromise* out of which resulted the adoption of the present constitution." To infer that a word used in the constitution ought to be construed rigidly, because there was, in the convention which framed it, a party in favor of giving very limited powers to the General Government, which party, it is confessed, did not succeed in establishing their peculiar views, is a species of reasoning which this House will never adopt.

We are further informed, by the report, that the wise framers of the constitution must have foreseen that the seat of the General Government would collect a number of persons "whose long habit of dependence on those who might fill the chief places in the Government, would do much towards enlisting them in support of almost any cause which the administration might wish to promote." Without stopping to inquire whether mankind are really as corrupt as this remark implies, I must deny the inference drawn from it in the report. It is inferred, that because these framers foresaw this supposed state of things, *therefore* they meant to prohibit the election to this House of any person so residing at the seat of Government. I have already adverted to the far greater influence of the Executive in this House, by the unlimited power of appointment from among its members. If the number of members which have been thus appointed for thirty-five years past, be compared with the number (one) elected to this House from among those employed at the seat of Government, we shall see the magnitude of the influence from the former source, compared with that from the latter. Now, to suppose that the framers of the constitution intended expressly to guard against the latter comparatively trifling

source of Executive influence, and yet overlooked the former overwhelming one, is to suppose them an assembly of weak and short-sighted men, wholly unworthy of the great trust reposed in them. It is plain, then, that they had no such fears as this report attributes to them, but believed that men might be honest, though once employed at the seat of Government, or though even under the far stronger influence of a hope of still further Executive patronage.

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The report subsequently alludes to the experience of the British nation, and the supposed intention of the framers of the constitution to avoid the evils incident to the election of members of the British Parliament. In the remarks which I had the honor to submit to the Committee of Elections previous to their report, and which are printed with it, I have suggested what seems to me the reason why inhabitancy has been, for a long period, made a qualification for office by so many of our constitutions and laws. Our ancestors had seen the evils experienced in Great Britain from their system of representation, and aimed at preventing their existence in this country, without weighing fully the difference of conditions between that country and this. Such, I presume, was the motive of the *first* adoption of this rule; a rule which was continued, and engrafted into the constitution of the United States, rather from habit than from any serious fears, at that time, of danger to liberty from the want of such a rule. So different is the condition of representation in this country from that in Great Britain, that I venture to say that no injury would be experienced by us if the clause of the constitution requiring inhabitancy as a qualification for a seat in this House were entirely abolished. The equality of our representation, and the great number and intelligence of our electors, render it impossible, even without such a clause, that the evils of representation found in the British system should ever exist with us. The votes of one, or two, or five electors, as in England, may be controlled, but those of five thousand, as in the United States, cannot be. For this reason, I believe most fully, that if this clause of the constitution were entirely abolished, no practical evil would result. And, therefore, I believe that the clause was inserted by the framers rather from habit than from a belief in any necessity for that over rigid adherence to the principle which this report inculcates.

When reading this allusion to the improper influence exercised in elections to the British Parliament, I confess I had one regret. I did regret that the committee did not add that not the slightest appearance of such influence existed in the case in question. Since the committee allude to such improper influence in Great Britain, as having a bearing on the present subject of debate, some may be led to infer that possibly it had real existence in the election now contested. It was shown, apparently to the entire satisfaction of the

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committee, that none such existed in the case. I do regret that the committee, when alluding to such influence, did not explicitly state their belief that such was the fact.

The report proceeds to state that "the true theory of representative Government" requires that the Representative be "selected from the bosom of that society which is composed of his constituents," and that he should possess a knowledge of their character and political views, and for that purpose should "mingle in their company, and join in their conversations;" and that he should especially have "that reciprocity of feeling and identity of interest, which exist only among members of the same community." This is a beautiful theory, but happens to make no part of our constitution, and therefore has no application to the case in question. We are all prone to fancy to ourselves what ought to be a rule of action, and thence to infer that such is in fact the established rule. This is an error. Our inquiry now is, What is the constitution? not, what *ought* it to be? That the above picture is ideal, and unsupported by the constitution, is easily shown. Suppose, when I came to this city, I had, instead of this, gone to the State of Ohio, and settled there, with full and evident intention of making it my permanent abode. And suppose, in one month after this, a district of that State had been as infatuated as a district in Massachusetts seems to have been, and had, in its weakness, selected me to a seat in this House. This would unquestionably have been a valid and constitutional election. What then becomes of the above beautiful theory of representative Government? Where is the Representative coming from the bosom of the society of his constituents? Where his mingling in their company, his joining in their conversations, and his intimate knowledge of their character and political views? It is plain that nothing of this is found. Yet a provision securing these advantages, the report asserts, is "*absolutely necessary*" for "every well-regulated Government." Either, therefore, our Government is not a well-regulated one, or the report under consideration is incorrect. We shall be safe in continuing to believe that our Government is a good one, and that the people may still be trusted with selecting their own Representatives, without a danger that they will select persons wholly unacquainted with their interests and views.

The report, in illustration of its doctrine, quotes the journal of the convention of 1787, which framed the constitution of the United States. I feel greatly indebted to that journal, for it proves, conclusively, that the rigid doctrine of the report is unsound. By recurring to the journal, we find that the earlier draughts of the constitution, when speaking of the qualifications for a seat in this House, use the word *resident*; requiring that the person elected should be a resident of the State in which he should be chosen. But to-

ward the close of the convention, the word resident was changed to the word *inhabitant*; which plainly shows that the framers of the constitution considered that a person might be an inhabitant of a State, though not actually resident in it. We further find, that the qualification for the office of President was, in the first draught, twenty-one years an *inhabitant* of the United States; but this was afterwards changed to fourteen years a *resident*. This twofold change proves clearly that the two terms, inhabitant and resident, were understood by the convention to have distinct and separate meanings. So evident is this fact, that the report itself admits that the word inhabitant was inserted in place of resident, "*as a stronger term.*" This admission completely overthrows the main principle of the report; which is, that, according to the constitution of the United States, a person is an inhabitant of that place in which he actually resides. If the stronger term, inhabitant, mean mere "*locality of existence,*" mere residence in a place, what *less* than this can the weaker term, resident, mean? This one fact, as admitted by the committee themselves, proves that the fundamental principle of their report is unsound, and therefore ought not to be sustained by the House.

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The report cites *Vattel*, and *Jacob's* law dictionary, in support of its definition of inhabitancy; but it does it hesitatingly, as in doubt of the applicability of these foreign authorities to an American question. I agree with the committee in their doubts: I do not believe these authors would be conclusive authority, even if they were most explicit and full. But they are the reverse of this. *Vattel* says, "Inhabitants, as distinguished from citizens, are *strangers*, who are permitted to settle and stay in the country." Even according to *Vattel*, it is only those who *settle* in a place that are inhabitants of it. As I never *settled* in the District of Columbia, and never intended to settle there, the quotation does not apply. Besides, according to *Vattel*, inhabitants are *strangers*. What becomes of the delightful theory of representative Government, laid down in this report? If inhabitants are strangers, where is the Representative coming from the bosom of the society, with his knowledge of its character and views? The quotation from *Jacob* is still more vague. These authorities prove nothing.

The constitution of Massachusetts is quoted in the report as declaring that a person shall be considered as an inhabitant "where he dwelleth or hath his home." This the committee consider as "settling conclusively" the meaning of the word. Persons acquainted with the civil concerns of that State well know that that definition is held as leaving the question as doubtful as it found it. So far is it from settling the question conclusively in favor of the rigid doctrine of the report, that the whole practice of that State proves the reverse. The decisions of the highest judicial tribunal of

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the State, as well as its legislative proceedings, prove that the word inhabitant, in that State, does not mean, as this report contends, barely residence in a place, but refers to a person as a member of the political community. The qualification of a voter for Governor and Senators is inhabitancy, without using at all the word citizen or citizenship. And yet (see Mass. Reports, vol. 2, pp. 245, 263, and vol. 7, p. 523,) the question respecting a right to vote is invariably considered as involving the question of citizenship. Numerous cases also in its legislative history show that inhabitancy is retained, without actual residence. Besides, the terms citizen and inhabitant are used in the constitution of the State without any apparent distinction.

If, therefore, we take the use of the term inhabitant, in Massachusetts, as the test of the legality of the election in question, it is most unquestionably legal. Every authority is in its favor. And this use, probably, ought to be the test. When the constitution of the United States says that a member of this House must, at the time of his election, be an inhabitant of the State in which he is chosen, it probably leaves to each State to determine what shall be its own terms of inhabitancy. If, however, we take the other ground, and consider the question as one to be determined solely by the constitution of the United States, without reference to the State authorities, it has already been shown that the framers of the constitution, as admitted by the committee themselves, had a different understanding of the meaning of the word inhabitant from that contended for in this report.

It is also stated in the report that the constitutions of Delaware, Georgia, and Ohio, have a saving clause in favor of persons absent from those States: and this saving clause is given as proof that absence destroys inhabitancy. It might have been stated that not only these three States, but nearly all the States in the Union, acknowledge the same principle in favor of their citizens, when absent in the service of their State, or of the United States. The constitution of Kentucky, for instance, has the following provision: "Absence on the business of this State, or the United States, shall not forfeit a residence once obtained." The same principle, to a greater or less extent, is recognised by the constitutions of twelve out of the eighteen States whose constitutions have been formed since that of the United States. And Virginia, in her general election law, adds also her example to the list. Instead of inferring from these facts, as this report infers, that mere absence destroys inhabitancy, I infer, and confidently infer, the very reverse. This general concurrence of the voice of the nation, in favor of persons in public employment, proves that the principle is founded deeply in the common sense of mankind. It proves that it is an essential principle in our free institutions, that absence on public employment shall not diminish the rights of the person so employed.



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The report cites the act of March, 1790, for taking the first census, as proof of the correctness of its own definition of the word inhabitant. We know very well that laws are often passed without much regard to critical verbal accuracy. In most cases the language is such as happens to be reported by a committee: and I am not at all inclined to support the infallibility of committees. But suppose the word inhabitant is used in this law with entire accuracy, even this proves nothing. It does not prove that the first Congress meant to exclude from the enumeration persons who were temporarily absent from their original permanent homes. It therefore proves nothing.

Nor does the judiciary law of 1789, cited in the report, prove any thing. In the whole of that long act, the word inhabitant appears to be used but twice—in the 11th and in the 27th sections. And in neither case does the use of the word give the slightest sanction to the doctrine advanced in this report.

In reply to the almost irresistible argument in my favor, drawn from the numerous instances in which persons have enjoyed the privilege of inhabitants while absent in public employment, the report contends that such instances cannot be properly adduced as precedents, where the question was not formally agitated and decided. This doctrine, I venture to say, is unsound. Whatever may be its correctness, as applied in the strict practice of courts of law to *principles*, it cannot be true as applied to the meaning of a *word*. Language, we all know, is perfectly arbitrary. The meaning of a word is determined wholly by its *use*. If the people of a country, by common consent, consider a person as an inhabitant of a State, though he is temporarily absent in public employment, this must be received as the true meaning of the word, even if there were not a single formal decision on the point. Such general practice shows what is the common sense interpretation of the word, and is conclusive of the question.

We might go further than this. Even if it were proved that the framers of the constitution understood the word in the same sense as is contended for in the report, (though we have seen distinctly that they did not,) yet, if it were also proved that, for thirty years past, the uniform understanding of the people of this country has been different, and their uniform practice different, it would be wrong to reject this uniform understanding and practice, and revive the obsolete use of the word. Language is ever fluctuating. The title of one of the most ingenious treatises on philology ever presented to the world, very aptly expresses this character of language: "*winged words*." Words are indeed winged; they are constantly changing their meanings, and assuming new uses. If the constitution of a country, by the lapse of time, have a different construction from that originally given it, and any supposed evil ensue, the proper remedy is to



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amend the constitution, and not to attempt to revive obsolete interpretations, to the prejudice of the rights of persons who have acted on the faith of long and uniform practice. In the present case, however, there is no necessity for this. We have seen that the framers of the constitution did not understand the word inhabitant as it is defined in this report.

There is one argument, Mr. Chairman, entitled to great consideration: it is the peculiar condition of the District of Columbia, and its government. The Committee of Elections, however, in their report, confess themselves unable to discover any thing in this circumstance applicable to the present case. To my view, the circumstance is a most important one; so important, that perhaps the question might be rested safely on this point alone, without even naming any other.

The District of Columbia is a district erected expressly for the accommodation of the States of this Union, as the seat of their common Government. This common Government exercises exclusive legislation over it. Every State, therefore, partakes of its jurisdiction; and every person residing in the District is under the *participant jurisdiction* of his own State. To say, then, that a person coming from one of the States to this District, has left entirely the jurisdiction of his own State, is incorrect; he has left its peculiar and separate, but not its participant jurisdiction. Let us suppose a district of ten miles square in the centre of Maryland, divided into four equal parts, and owned by four individual persons: suppose these persons should convert one square mile, in the centre of this district, into a joint property, for the purpose of a park; and suppose Maryland should pass a game law, prohibiting every person from hunting on any grounds not his own—can we believe that this law would prohibit those four proprietors from hunting in their joint park? No. Yet in the same sense in which this park is the property of these four persons, is the District of Columbia the territory of *each* State in the Union. Who will deny that each State participates in the legislation of this House? In the same degree it participates in the jurisdiction of the District of Columbia.

The report says that the same rule will apply to all the territory purchased by the United States as to this District. The correctness of this position is distinctly denied. The power of Congress over this District, and that over such territories, are powers derived from two entirely distinct clauses of the constitution, and clauses having a marked distinction of phraseology. To say that what applies to one power *must* apply to the other also, is, therefore, plainly erroneous. But even if correct, it would not prove the correctness of the report. If any one can, by an effort, prove that what applies to the one applies also to the other, he shall be welcome to the full benefit of his effort. The doctrine will still be true and unshaken, that each State participates in the jurisdiction of the District of Columbia.

It may also be truly said that a person employed in the business of the United States is employed in the business of each State. The agent of a commercial house is the agent of each individual associated in the firm. So the business of the United States is the business of each State so united. A person, therefore, who leaves his own State to discharge any executive duties at Washington, is employed in the business of that State, and continues under its modified jurisdiction. That the Committee of Elections should confess themselves unable to discover a distinction between such a residence at Washington and an ordinary "settlement in one of the States of the Union," is indeed remarkable.

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In the seventh page of the report we have a statement of the views of the committee respecting ambassadors and other foreign agents, which, taken in connexion with other parts of the report, has indeed surprised me. It is stated that no analogy exists between the cases of such foreign agents and the case in question; inasmuch as an ambassador cannot become a "citizen" of the country in which he resides, nor can he "lose his allegiance" to his own country. Here the committee have fallen into the very error (if error it be) against which, in a former part of their report, they hold out a pointed caution. In page 4 they say that "many of the misconceptions" which prevail respecting inhabitancy have arisen from confounding the terms *inhabitant* and *citizen*. "The word *inhabitant*," they say, "comprehends a simple fact, locality of existence; that of *citizen*, a combination of civil privileges;" yet, in page 7, when speaking of ambassadors, they commit the very error against which they had just protested, and speak of *citizenship* and *allegiance*, saying nothing of *inhabitancy* and the ambassador's *local existence*. If the main doctrine of the report be correct, that "civil privileges" relate exclusively to citizenship, and not at all to inhabitancy, and that inhabitancy comprehends barely the fact of *local existence*, then an ambassador is most plainly and indisputably an inhabitant of the country in which he resides. The doctrine, therefore, in relation to ambassadors is utterly inconsistent with the fundamental principle of this report.

Equally inconsistent with it is the report of the same Committee of Elections, made on the 3d instant, in the case of the member from Georgia, (Mr. FOSYTH.) "The capacity in which he acted," says the second report, "excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States." How the capacity in which a person acts can change the "fact" of his *local existence*, is perfectly incomprehensible. If the doctrine of the first report be true, that inhabitancy means barely the fact of local existence, and if a minister of the United States actually reside in Spain, it follows, by irresistible necessity, that he is an inhabitant of Spain, and not of the United States. To speak of the capacity of a minister, and the privileges result-

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of their own motion, to collect evidence, thus making themselves the prosecuting party; a situation which, from the very constitution of human nature, without any improper motives, the imputation of which was expressly disclaimed, must give a bias to the committee unfavorable to the sitting member, and render his position less eligible than if his seat had been regularly contested; and thus an unfavorable report, by a bare majority of the committee, was obtained, which, from the confidence habitually and necessarily given by the House to its committees, operated injuriously to the sitting member. Mr. B. proceeded to argue, that whether the rules and practice of the United States, or those of Massachusetts, be taken as the test, the report of the committee was unsound; since the journal of the convention of 1787 proves that inhabitant and resident were deemed different; and numerous precedents, both of Massachusetts and of the United States, confirm the distinction.]

Speech of Mr.  
Fuller.

Mr. FULLER said he felt some embarrassment in addressing the committee, in consequence of the notice given yesterday of his intention, a circumstance he always, if possible, avoided. He would not deny, he said, that he felt a strong desire to convince them of the correctness of the views which he entertained upon the subject of the contested election of the sitting member from the district of Norfolk, in Massachusetts.

The power of deciding upon the claims of members to their seats is given in the first article of the fifth section of the constitution, in these words, viz. "Each House shall be the judge of the elections, returns, and *qualifications* of its own members." This clause comprehends three particulars, elections, returns, and "*qualifications*." The two first, it is manifest, cannot have been previously considered and determined by the people themselves, and are, therefore, to be determined by the House, unaided and uninfluenced by such previous determination. But the "*qualifications*" of the member, as they must have existed before and at the time of the election, must be presumed to have had the deliberate consideration of the electors themselves, and, if the House should reverse *their* decision, it ought to be supported by the most clear and incontrovertible reasons. What are the qualifications required by the constitution for a member of this body? That he be twenty-five years of age, have been seven years a citizen of the United States, and, "when elected, an inhabitant of the State in which he shall be chosen." The last of these qualifications is the only one necessary to be considered in the present case; and of this, above all others, I contend, said Mr. F., that the citizens by whose suffrages the member was elected, and has hitherto held his seat, possessed far better means of judging correctly than this House, or its Committee of Elections, can possibly possess. Without going at this moment into technical definitions of the term *inhabitant*, I may safely affirm that the *spirit* and *intent* of

again to the municipal regulations of his country. International law *returns him to* his country, but cannot allot him to this or that particular section of it. The latter is the part, purely, of municipal law. To say that international law determines whether a minister of the United States, on his return from his mission, is an inhabitant of Georgia or of Maine, within the meaning of the constitution of the United States, so as to be eligible to a seat in this House, is too obviously incorrect to need comment.

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But, even if we could for a moment admit that international law can determine the municipal *privileges* of our citizens, it has no bearing on the question of inhabitancy, if the doctrine of the first report be correct, that privileges relate wholly to citizenship, while inhabitancy means the simple fact of *local existence*. To resort to international law to ascertain the fact where a person has his local existence, is to give that law a use which, it is believed, is wholly new.

Under every view of the subject, therefore, it is evident that international law cannot be brought to fix any difference between the case of an executive officer in foreign employment and one employed at the seat of Government. If "the word inhabitant comprehends a simple fact, locality of existence," as the first report contends, then a minister residing abroad most plainly ceases to be an inhabitant of his own country during such residence. If, on the other hand, as the second report contends, a minister, as to his inhabitancy, "must be considered as in the same situation as before the acceptance of the appointment," since he is in "the performance of his duty abroad," equally ought a person, who is in "the performance of his duty" in an executive office at Washington, to "be considered as in the same situation as before the acceptance of the appointment." The same rule, under a Government of equal laws, must apply to both.

From these views, Mr. Chairman, of the principles contained in the report of the Committee of Elections on the case in question, and of the obvious inconsistency of its different parts, we may easily determine whether that *clear and positive case* is made out, without which the right of a sitting member, and the clearly expressed will of the people, ought never to be set aside.

[Minutes of the first part only of Mr. B.'s remarks were taken by the reporter. In the subsequent part Mr. B. contended that he had a right to complain of the course which proceedings had taken; that very partial and feeble remonstrances, two out of a great number which were got up *out of his district*, printed, and distributed through it *anonymously*, were forwarded to a member with an *anonymous* letter, and were received, and made the ground of proceedings, contrary to every precedent in the history of the House; that, in the absence of all evidence whatever accompanying the remonstrances, the Committee of Elections proceeded,

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the original for the purpose, I think it probable the idea of the author would have been correctly expressed in our language by the latter word. But, however that may be, the constitution, in speaking of inhabitants, certainly does not mean "*strangers*" or *foreigners*. Equally certain it is that "*locality of existence*" is not the constitutional definition, since this transfers a man's inhabitancy from one place to another, whensoever he may be obliged to journey from one town or State to another, however short his stay, and however speedy his return. Every absence from the place of his permanent abode would be a suspension of his inhabitancy, and a temporary disfranchisement of his rights, under the constitution. The true meaning of the word *inhabitant*, in my opinion, is, a person who has a *permanent home* or domicile in a place. In this definition I am sustained by Vattel. "The domicile is the habitation *fixed* in any place, with the intention of always staying there. A man does not, then, *establish* his domicile in any place, unless he make sufficiently known his *intention* of fixing there, either tacitly or by an express declaration. However, this declaration is no reason why, if he afterwards changes his mind, he may not remove his domicile elsewhere. In this sense, *he who stops, even for a long time, in a place, for the management of his affairs, has only a simple habitation there, but has no domicile.*" B. 1, ch. 19, sec. 218. That it is in this sense, of *permanent habitation*, that the word *inhabitant* is used in the constitution, is clearly shown from the fact adverted to in the report of the committee itself. The word *resident* was used in the first draught of the constitution, and afterwards, upon mature consideration, was struck out, and "*inhabitant*" substituted, as it now stands, as the qualification for Representatives; while, in art. 2, sec. 1, it was provided in the original draught that the President shall have been fourteen years an "*inhabitant*" of the United States, and was afterwards so altered as to require the present provision, viz. that he shall have been "*fourteen years a resident within the United States.*" Hence it is certain that it was then intended, as to the candidate for President, not merely that he should have his *permanent habitation* for that period of time in the country, because such habitation would not preclude his absence from the country on public or private business perhaps two-thirds of the time, but that he should have the advantage of *actual residence*, or, in the words of the report, of "*local existence*," during that period, within the limits of the country over which he is to preside. At the same time, a Representative is required not merely to have his *residence*, or temporary "*local existence*," in the State "*when elected*," which he might do, without any fixed habitation there, and without having ever passed a month or even a week within the State, or having any right or interest in common with its citizens; but he must have his *permanent habitation* or domicile in the State, which is implied in requiring him to be an "*inhabitant.*"



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How much more wise and effectual is this provision than the requisition of residence only, must be obvious to all; yet it is in this sense only, by the construction of the committee, that a Representative is required to be an inhabitant. He must, when elected, have his "*local existence*" within the State, but his *permanent* habitation may be in any other State, or in any other country! Their quotation from Vattel, showing that inhabitants may be *strangers*, that is to say, *foreigners*, fully justifies me in ascribing to them this preposterous interpretation of the constitution.

The committee very properly concede that the definition of the word "inhabitant," as it was contemporaneously understood in Massachusetts, ought to have great weight in fixing its import in the present case; and they cite a passage in the constitution of that State, for the purpose of sustaining their own conclusion upon that point, viz. "To remove all doubt concerning the word *inhabitant*, in this constitution, every person shall be considered an inhabitant for the purpose of electing and being elected into any office or place within the State, in that town, district, or plantation, where he dwelleth, or hath his home." Rep. p. 6. Now, this passage in our State constitution is in point, not to support, but to confute, the reasoning of the committee; for it shows, conclusively, that the citizens of Massachusetts can elect and be elected, not where they have a mere "*local existence*," where they are "*strangers*," in the language of Vattel, but where they have their "*home*"—their domicile, or *permanent residence*.

In conformity with this understanding of their constitution, has been the constant usage in Massachusetts, of which it is easy to enumerate many instances in point. As a qualification for the office of Governor, the same constitution requires that the candidate shall have been an inhabitant of the State for seven years "*next preceding his election*." Mr. Gore had been absent in England six or seven years, as a commissioner under the treaty of 1794, and, within three or four years after his return, was elected Governor. This was in times of violent party contention; yet, among many objections taken at the scrutiny in the Legislature, this was never once mentioned. The present Governor, Eustis, had been absent from his country on a foreign mission, for many years, and, within three or four years after his return, was elected to the same office. It never once occurred to those who preferred his rival, that he was not eligible, because, for more than half the "*seven years next preceding his election*," he had had his "*local existence*" in a foreign country. Nor are instances wanting of persons, who were absent on their own private concerns, being elected to offices requiring, by the constitution, that they should have been inhabitants a term of years, which included the period of their absence "*next preceding*" their election; among whom the cases of Benjamin Hichborn and William Hull were in evidence before the committee. To obviate the force of these practical in-



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interpretations of the term inhabitant, as used in Massachusetts, the committee are obliged to resort to the supposition that the elections were not duly contested or scrutinized, because such opposition to the "choice of the people is a very unpleasant task." But the fact is well known that this "unpleasant task" was constantly, and with avidity, undertaken by rivals and partisans, whenever any plausible pretext was afforded; and many examples of successful opposition to sitting members might easily be adduced. The real cause of the forbearance to take *this* exception to the validity of the elections before stated, was, that the common sense and understanding of the community concurred in giving the construction, for which we contend, to the term in question.

How, then, it may be asked, is the *permanent* domicil, the home or habitation of a person to be determined, of a man who, though once well known as both an inhabitant and resident, has been several years absent? The answer is not difficult; the true characteristic is the *animus revertendi*, the intent of returning. When a person removes from his proper home, and goes to another State or country, with the intention of *fixing* there his *home*, his rights, as an inhabitant of the place from which he departs, cease *immediately*, and do not continue, as the committee erroneously suppose, till he shall have acquired new rights in "the place where he has taken up his residence." Rep. p. 5. The very act of departure, with the intention of not returning, severs at once his relation of citizen, and divests all his rights and privileges as such. On the contrary, if he leaves his home for any other State or country to transact business, public or private—as a minister in a foreign court, or a consul, or as a merchant, a factor, or a student—still intending, when the object of his departure from his permanent home shall have been accomplished, to return, and resume his accustomed residence, then he is never divested of the rights which his inhabitancy conferred. His absence, it is true, deprived him, in some respects, of enjoying those rights, while it continued; but the rights themselves were neither extinguished nor suspended.

In many cases, it is true, there may be much difficulty in determining, or *proving*, the existence or non-existence of the intention of returning; and I have no doubt the confused and contradictory reasoning of the committee may be, in a great degree, traced to their mistaking the *evidence* of the criterion for the criterion *itself*. Thus they say, p. 8: if a son absents himself from his father's house for years, and in the mean time *marries a wife*, his original domicil must be considered as abandoned, and a new one established, &c. Now, who does not see that the mere circumstances of absence from his home for several years, and marrying a wife in another place, are not *ipso facto* a permanent change of habitation; they are, indeed, circumstances having a tendency

to establish the real criterion, the intention. The truth is, a person cannot assume the right of a citizen or inhabitant in the place to which he removes, without his own voluntary assent. The relation of a citizen to the county or community where he belongs, is a *contract*, and his assent is indispensable. By mere residence, it is true, he incurs certain obligations, and by comity between our States and cities, his silence alone might be considered as implying his assent to become a citizen; but if he remains silent when he really does *not* intend to become a citizen by a permanent residence, and by that means is admitted to exercise the rights of a citizen, he commits a fraud upon the community whose comity is thus abused. If he disclosed the truth, that he considers the place from which he came as his proper home, and that he does not intend to become a citizen of the place of his temporary residence, nor to identify himself as such with its interests, he could not be admitted to the privileges of citizens and inhabitants. Will any one deny that a person, persisting in such an intention, explicitly avowed, of returning to Boston or Philadelphia, his native city, and the place from which he had emigrated, would not be allowed at Richmond or Charleston to exercise the right of suffrage as a citizen? No length of time, not even marriage, or any other circumstance, could obviate the single objection as long as it continued to exist. Our laws for naturalization of aliens require a solemn declaration, in a court of record, of the wish and intention of foreigners to take upon themselves the duties and rights of citizens. The difference between foreigners and the inhabitants of the United States, in relation to each other, is only in the *degree of alienage*, if I may use the expression; the *principles* in the transfer of rights and obligations from citizens of one State to another, are perfectly analogous. The intention in one case must be solemnly avowed in a court; in the other, it is sometimes *inferred* from residence and silence, with other concurrent circumstances; but in neither case can the new relation of citizen be obtained against the explicit intention of the individual himself.

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Let us apply these principles to the case of the member from Massachusetts, whose seat is contested. He is a native of Canton, in the State for which he was elected, but, at an early age, left his father's house, and received his education at a college in a neighboring State. When his education was completed, he was appointed an instructor in the same seminary, where he remained several years.

On his return to his native place, he was very shortly elected a member of the Legislature of the State; and on that occasion his absence from the State was urged as a disqualification under the provision of the constitution of the State before stated, requiring the inhabitancy of members within the States for a term of years next preceding. After

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full investigation, the objection was abandoned; which is another practical interpretation of the term *inhabitant* in the State of Massachusetts. In autumn, 1817, he was appointed by the Secretary of State a clerk in that department, in which situation he remained till he was elected to the station which he now occupies. During this period, he has frequently revisited his friends in Norfolk district; and has constantly maintained such an intercourse, through the medium of friends and correspondents, as has preserved an intimate knowledge of his present constituents, and of their sentiments and political views. Indeed, without this, it may safely be affirmed he could not have obtained a nomination, much less an election, against numerous competitors and a powerful opposition. Several years since, it is within my personal knowledge, though not included in the printed evidence before the committee, that he was a candidate for the same station, which, however, was at that time conferred on the worthy predecessor in this House of Governor Eustis. Before his appointment to the State Department, and while an instructor at Providence, he selected a library, of considerable value, which was placed in his apartment in his father's house, and there still remains. In Washington he has lived in a boarding-house, and devoted his attention exclusively to his official duties, taking no share whatever in the local concerns of the city or the District. He never assembled at the ward or other local meetings, was never a candidate for any office, was never assessed in any tax, or took any other concern in the interests of the place, than as a stranger. Had he intended to become a citizen of Washington, it is reasonable to presume he would have intermingled in the various measures which have characterized the citizens of the District. With the ambition which we must admit he has always entertained, of participating in the councils of the nation, an honorable ambition, of which he never lost sight, instead of seeking that distinction from the suffrages of his native district of Norfolk, he would probably have been foremost among those who have so often exerted their efforts to obtain a Delegate for the District of Columbia upon the floor of this House. In these efforts, he might reasonably have expected some distinction; and, could the point have been attained by delivering the citizens from what some of them have recently denominated the "despotism" of Congress—a paternal despotism, however, they admit it to be—he might fairly have challenged a high place among the "liberators" of the present times. From all these overt acts of citizenship, he wholly abstained; and these, in my opinion, constitute a chain of *negative* facts, which, in coincidence with his continued and uncontradicted declarations of his intention of remaining a citizen and inhabitant of Massachusetts, which are so explicitly proved, can leave no possible doubt that such *was* his intention, fixed and unchanging, from the day of his departure to the present hour.

The circumstance of his marriage has not the least tendency of an opposite character. His wife was herself a foreigner, having resided only four years in this country; and he has never assumed the station of a housekeeper, but has remained with his wife at board as before; not, indeed, in a public hotel, but with her mother. Members of Congress not very unfrequently enter into the matrimonial connexion in Washington, and it would be as reasonable to fix them, by that act, citizens of Washington, as the sitting member.

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It is clearly admitted by the report, (p. 7,) that ministers of the United States, resident in foreign countries, do not by such absence lose their rights as citizens or inhabitants of the States in which they had previously possessed them. Here, then, the committee are compelled to admit an exception to their principle before adverted to, that inhabitancy is "locality of existence." They seem also to admit, but less explicitly, that the *higher* officers of the Government may still retain their right of inhabitancy in the States, though they may reside at Washington, in the discharge of their public functions; while they deny this advantage to those in "subordinate employments." In other words, the President and the heads of the Executive Departments may remain at Washington for an indefinite length of time, without prejudice to their respective rights and privileges as citizens of the States in which they were previously inhabitants. It never was doubted, I presume, that the President and the principal executive officers do in fact retain those rights and privileges in the States; and instances have occurred, when they have received the suffrages of the citizens of the States, for offices to which, by an opposite doctrine, they would be ineligible. The true reason of this is, that the circumstances under which they reside at the seat of Government, raise no presumption that they intend to quit their permanent homes in their respective States, or to become citizens of Washington. Here, too, the committee must admit another exception to their principle; and at the same time it is clear that the *intention alone*, the *animus revertendi*, determines the point, that those high officers remain citizens of the States, instead of being disfranchised by living at the seat of Government. By what principle of the constitution, by what doctrine known to our republican system, or to human reason itself, can they exclude *inferior* or "subordinate" officers from the *same* rights in their respective States, when their intention of retaining those rights, and of remaining citizens of those States, shall clearly appear? It cannot be admitted; this distinction between *chief* and *subordinate* is abhorrent to justice and to reason. Our feelings revolt at the assumption. Nor ought it to be overlooked that the origin and the tenure of the principal and subordinate officers of the executive branch of the Government are alike known to the constitution. By art. 2, sec. 2, the President is authorized to appoint

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his "principal executive" officers, which implies the existence of *inferior* officers in those departments; and the appointment of the latter is authorized to be vested in the *heads* of the departments. Under this authority a law was passed, vesting the appointment of clerks of departments in the Secretaries. Hence it appears that the *tenure* of their offices is precisely the same with that of the Secretaries themselves. It is not to be tolerated for a moment, therefore, that the interests of the inferiors are to be judged and decided by rules and principles less favorable than those of the principals. Justice knows no distinction—"Rex Jupiter omnibus idem."

I readily concede that it may be more difficult for a clerk to demonstrate his intention of returning to his original domicile, from the circumstance that many of the inferior officers of the departments do in fact remain in this city, and hold their offices for many years, and often during the remainder of their lives. A Secretary, or even a President, might also adopt the *intention* of becoming a citizen of Washington, and of relinquishing his former domicile. The point contended for is, that the intention in both cases is the true principle upon which the fact of citizenship, or domicile, is to be determined. In the case before us, I think it may fearlessly be affirmed that the intention of the member to retain his domicile in Massachusetts is proved beyond all question; and, consequently, it most clearly follows that he was, at the time of his election, an inhabitant there, and eligible to a seat in this House.

The relation of the District of Columbia to the United States, as established by the constitution, affords in itself a strong presumption against the inference that persons, who remain here in the execution of public functions, intend to relinquish their domicile and concomitant privileges in the States from which they came. Those functions, in many cases, cannot be performed elsewhere, and the territory of ten miles square is allotted as the central point in the Union for their performance. Add to this the fact that the citizens of this District are governed by laws in which no representative, elected by their suffrage, has any voice, and it is evident that an ambition of political distinction, such as the sitting member has repeatedly evinced, could not here be successfully indulged. Surely it ought to be only in clear cases, that the House should adopt a conclusion which divests a citizen of rights in his native State, without remitting him to equal rights elsewhere. The case of a navy yard or arsenal is analogous in principle, the jurisdiction of those places being ceded to the United States. Suppose a citizen of Charlestown, an officer in the navy or marines, to reside within the limits of the navy yard with his family for a course of years, as is often the case; will it be alleged that his residence within the territory and jurisdiction of the United States divests him of his rights as a citizen of the



State? No such doctrine can be supported. The injustice is too obvious. The residence in the public ground is like residence on board a public ship, and an absence for years in a public ship will not be pretended to produce disfranchisement. Residence in this District, solely employed in public business, without the power of acquiring and enjoying the common privileges of citizens of the United States, and without the intention or wish to possess the imperfect and mutilated rights of the citizens here, ought by no means to be construed a divestment of the ample rights and privileges of a free citizen of one of the sovereign States of this Union.

A gentleman from New York yesterday (Mr. STORRS) proposed several questions, all of them in substance admitting of one answer. He asks, what would be the condition of an inhabitant of this city, in case of a retrocession of the territory to Maryland? My reply is, the citizens would then be citizens of Maryland; but the residents, *not* citizens, would then, as at this time, retain their rights in their several States.

The Committee of Elections suppose it to have been a favorite provision in the constitution, obtained by the exertions of those who were champions for maintaining "State distinctions and State feelings," that the Representatives should be inhabitants of the States in which they are elected. Admitting this to have been the fact, the definition of the term contended for by the committee would defeat this desirable purpose, since the "local existence," required by the report, is, in its nature, transient; whereas the construction I have supported supposes continuity and *permanence* of domicile. Another object of the provision, supposed by the committee, was to prevent those who had held offices under the "General Government," meaning, probably, the executive branch of the Government, from being elected to the legislative branch; and yet, by their construction, those who have held such offices, for any period whatever, have only to transfer their "local existence," their *temporary abode*, from the seat of the General Government to the State where they are to become candidates, and the objection is removed! Nay, the necessity of even this temporary return is only necessary for "*subordinate*" officers, clerks, &c., but is not affirmed to be necessary for the chief officers and heads of departments. Had the framers of the constitution had this object in view, they would not have made a provision so easily evaded, nor would they have guarded against the election of inferior officers, while those of superior station remained eligible. Against the latter there might sometimes be grounds of jealousy. *They*, when resident here, might, indeed, sometimes, too much identify themselves with the Executive, and their partiality might remain after they should have obtained seats in this House; but of

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inferior officers there can be very little danger of this sort. The humble sphere in which they move precludes the suspicion. On the other hand, it cannot escape the attention of the sagacious people of this country, in selecting their Representatives, that the knowledge of public business, of the intricate details of the various departments, which may be acquired in this subordinate situation, may be highly advantageous in the halls of legislation. Knowledge of this nature would enable Congress, while it ferreted out and exposed depredations upon the public treasure, if any existed, to do justice to the honorable and faithful in all the departments of the administration.

It is impossible, by provisions in a constitution, to supply the want of knowledge, or virtue, or vigilance, in the people. If these are wanting, the strongest barriers will be overleaped or prostrated. But, happily, in our country, and I speak especially of the State from which I have the honor to be a Representative, the people are the faithful guardians, by whom the purity, the *spirit* of the constitution will be most strenuously defended. The letter of the instrument may be evaded by cunning or corruption; the *spirit* is secured, reposing on the affection of millions of freemen.

If the member from Norfolk is to be deprived of his seat, on what ground, let me inquire, will the House decide? Let him, at least, have the consolation of knowing whether he is disqualified because his "local existence" was not in Massachusetts at the time of the election, or because the *intention* of returning was not sufficiently established, or because he married a wife in this city, or, lastly, because he held a *subordinate* office in an Executive Department; or if not for either of them, severally, whether the disastrous result is the consequence of all these causes conjointly.

I trust, however, the decision will be in favor of the member; in favor of the constitutional elective franchise; in favor of the respectable majority of his fellow-citizens, who have already passed judgment upon the very point now in controversy. Such a decision, I am confident, will bear the test of sound argument and clear conceptions of the constitution; a decision won by reason against prejudice, and which may, therefore, be safely cited as a precedent to the remotest period of our political history.

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Mr. STORRS said that the vote of yesterday in the committee was so decisive, that he had not expected that the debate—if that might be so called which had hitherto been almost exclusively confined to one side of the question—would have been renewed to-day. From the very limited share which the majority has taken in the discussion, gentlemen may have been encouraged to believe that their views of the case have been unanswerable. Their perseverance seems to call for some examination from this side of the House of the principles on which it has been so confidently,

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and continues to be pertinaciously, insisted that the member is entitled to his seat. He was much gratified, as a constitutional question was to be settled, that the vote had been so large in approbation of the resolution reported by the Committee of Elections. It has been very justly considered that the precedent to be established was of great moment. It concerns, said Mr. S., the political rights of every citizen who has voluntarily placed himself in the same predicament with the gentleman who claims to be considered here as a Representative of the State of Massachusetts; it affects the elective right of the people; but it most especially concerns the political purity of this House. It is the first occasion which has called on the House to settle the construction of that clause in the constitution which is drawn in question, and which must test the eligibility of a numerous class of persons, eminent for their personal respectability, and distinguished by their public stations. To those who come after us, the principle of our decision should be known. The member himself, and those who have sent him here, have a moral right to the reasons on which we justify a decision, which excludes him from this body, and the nation has a deep interest in whatever touches or may affect the independence and purity of their Legislature.

Mr. S. said that he was strongly inclined to think that the seat of the gentleman was vacant on one ground not alluded to in the report of the committee. He was elected after the 4th day of March last, on the 8th day of September. At both these periods he held his office in the Department of State, and continued to hold it until a few days before the commencement of this session, (the 21st day of October,) when he resigned it. I am aware, said Mr. S., that, when a similar question arose in the sixteenth Congress, it was determined that, under such circumstances, the seat was not vacant. The majority in that case, however, was less than the number of those voting who stood in the same predicament. I was at that time unavoidably absent from the service of the House, and the question was brought up during my absence; but I then thought, from the examination which I had given to it, that the continuance in office to so late a period, was at least incompatible with the acceptance of the seat under an election, if not an evasion, and inconsistent with the spirit of the constitution. It was not his intention now to seek to disturb that decision, or to revive its discussion. He was disposed to acquiesce in it in the case now before the House, because he thought that, under another clause in the constitution, the gentleman was clearly disqualified from sitting here as a member from the State of Massachusetts. There is no essential difference of opinion on the facts. He resided in Massachusetts, his native State, until the year 1817, when he accepted an appointment un-

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der the Government, in the Department of State ; removed to this city, where he subsequently married, and has resided with his family to the present time. Nor does it appear that he has even been in the State of Massachusetts during the past year, or since his election, or resignation, at all ; or that he has any domestic establishment there, or any estate, except some packages of books, which have been denominated a library. Was he, then, an *inhabitant* of that State *when elected* ? The constitution declares that “ no person shall be a Representative who shall not have been seven years a *citizen* of the United States, and who shall not, when elected, be an *inhabitant* of that State in which he shall be chosen.” It has been asked of us to point out the distinction which exists between a clerk in the department and the heads of the departments—as if it had been admitted that the persons at the head of these departments were eligible. I make no such distinction or admission. If the incumbents of these offices reside here, under like circumstances with the gentleman from the district of Norfolk, their eligibility to this House is in the same peril, and they must submit to the same constitutional disqualification. To those who have expressed alarms, that we might violate the right of the citizen, it is enough to say that the constitution itself has, in this respect, restricted them. It has superadded to the capacity of eligibility of all citizens, the further qualification of inhabitancy in the State. Their personal rights are secured in all the States, under another clause in the constitution ; but their political rights are necessarily subordinate to further qualifications. The question before us, is, What constitutes an inhabitancy of a State, in the political sense intended by the constitution ? or, has not the gentleman whose seat is questioned, become an inhabitant of the District of Columbia ? It is not a safe or proper rule, in ascertaining the sense of this word *inhabitant*, to resort to the signification of it, as used in the different States. It may import a different sense in every State, and no uniform rule could be devised, in seeking from these sources, for its meaning. It is used in a great variety of interpretations ; often fixed by statute, and by local usage. In reference to the settlement of the poor, or the right of voting, in various States, different regulations of the meaning of this word prevail, which import various dissimilar qualifications. In many of the States a person may be an inhabitant in one sense, for some purposes, but not for others. The constitution refers to none of these as a definition, and to attempt to confine it to any one of them is a mere gratuitous appropriation of some particular meaning, derived from our local sense of the term. Nor is this plain word shrouded in any of the technical mystery in which some gentlemen, in this debate, have endeavored to envelop it. We have heard, on yesterday and to-day, of inhabitancy in *esse*, of inhabit-

tancy in *posse*, and inhabitancy in *abeyance*. These may be very learned technicalities in legal science, but the framers of this constitution could never have dreamed of these ingenious mystifications of this word. Believe you, sir, if the convention had been asked its meaning, that one would have answered with the gentleman from Illinois, (Mr. Cook,) that a person removing to another territory or State, to discharge the duties of a public office located there, had left behind him an inhabitancy in *esse*? Another, that, with another gentleman, he considered that it might, under any circumstances, designate an inhabitancy in *abeyance*? Or that it was to be assimilated to what has been called, in this debate, the *domicil of goods*?

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Let us, discard, sir, these subtle refinements, which only lead us from perplexity to absurdity, and construe this constitution as we should, according to the plain, common acceptance of words. It is a question of common sense merely. The gentleman has resided in this city more than seven years; his family are here; his dwelling-place is here; it is his home. He is eligible to any office under the corporation of the place—a subject of taxation in the District—liable to jury duties. I repeat the question which I put to the committee before. It has not yet been answered. If this District was entitled to a Delegate in this House, whose qualification should be that he was an inhabitant of the District of Columbia, would he not be eligible to the place? Is he not now entitled to every privilege or right of an inhabitant of this District, be those rights what they may, civil or political? These questions must be answered in the affirmative; and, unless it can be shown that he has a sort of double capacity, which may constitute him an inhabitant of two distinct places at one time, and furnish him with two different domicils, he must be considered as an inhabitant of this District. What the nature of his rights may be here, or their extent, is a question of no importance. Be they greater or less, he is entitled to them, whatever they may be. It is enough for us that he has become an inhabitant of the District, and has lost his inhabitancy in Massachusetts, and is thereby rendered obnoxious to that clause of the constitution which forbids his eligibility in that State.

Against these plain conclusions of common sense, it has been maintained that he is, nevertheless, to be considered, for the purpose of eligibility, an inhabitant of Massachusetts. It is so contended, for the alleged reason that the removal of a person to this District, for the purpose of executing a public office, shall not work a dissolution of his inhabitancy in the State from whence he comes, but that he shall still be deemed to retain his inhabitancy as a citizen of that State. This doctrine can only be maintained on ground derived either from the peculiar political relative situation of the District, or the nature of a public office or employment.

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What peculiarity, sir, exists in relation to this territory of ten miles square, not common to all other territories of the United States? We have the "power of exercising exclusive legislation in all cases" over it—a phrase which denotes unlimited sovereignty. We are sovereign here precisely in the same sense, and to the same extent, as over all national territory. The same jurisdiction, for the same purposes, to an unlimited degree, we enjoy over them all. Inhabitaney in this District is precisely of the nature of inhabitaney in any other territory of the United States. Are gentlemen prepared to maintain that all the emigrants to the Arkansas, Michigan, or Florida Territories, retain their inhabitaney, under any technical notion, in the respective States from which they went? Or, if a different rule is to be applied to their case, I hope gentlemen will point out in what particular such a difference exists from this District, and on what principles it is founded. Is it possible that inhabitaney may be acquired in these Territories by removal to, and settlement in them, and not in this District? It is a distinction altogether untenable.

Is there any thing, then, in the nature of the public employment, or the locality of the duties of the office, which can justly create a distinction? Had the gentleman been appointed collector of the port of Norfolk, to which place he had removed, where he had married, and resided seven years, he would clearly be eligible to this House as an inhabitant of Virginia. His appointment as a judge in the Territory of Michigan or Florida, and removal to the seat of his duties in such Territory, would equally constitute him an inhabitant of the Territory, and he would doubtless acquire the capacity of being eligible to this House as a Delegate.

If the rule which gentlemen contend for applies to a removal to a Territory, by reason of some saving power of original State inhabitaney derived from the nature of the employment, the same reason would preserve the inhabitaney on a removal to other States, and all public functionaries would thus retain or acquire the right of eligibility either in the States from which they removed, or which they had adopted, or both. By such an interpretation of the constitution, all the registers and receivers of your Western land offices, the Governors and judges of the Territories from Lake Erie to Florida, and your Indian agents, are to be deemed inhabitants of their original States, and eligible as such to this House. Mr. S. said he hoped gentlemen would also define the extent of this privilege of their original inhabitaney. Were they to be considered as inhabitants of the States from which they emigrated for any other purposes, and for what purposes? Would they be recognised in such States as inhabitants for any local purposes? or must not the argument result in the absurd conclu-



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sion that eligibility to this House is the only capacity which they retain during all their migrations? If any such anomalous and incongruous doctrine can be supported, let me, said Mr. S., put a case which has actually occurred, and now exists. The present Treasurer of the United States removed from South Carolina to Philadelphia, on the organization of the Government. He continued to reside at Philadelphia until the removal of the seat of Government to this city in 1801. Had he been elected before 1801, as a Representative in Congress from the city or county of Philadelphia, would it be seriously urged that he was not an inhabitant of that place, and for that reason ineligible? He has since removed to this city; and I ask whether, by this new doctrine, he is still to be considered as an inhabitant of Philadelphia, or has he been remitted back to his first inhabitancy in South Carolina, because this District is territory, and not within any of the States, or for any other reason? It has been asked, in general terms, if we are prepared to disfranchise all who hold public offices in the District. No, sir, I am not prepared to outlaw them, if this is what is meant by the question. But, when gentlemen use these extreme expressions, it is well to examine how far the political right of all has been abridged, in this respect, by the constitution. An inhabitant of one State is deprived of the right of being elected in all the other States. Is there any reason in the imagination of any part of the House, why this District, or those who are inhabitants here, should be more highly favored, and gifted with more unlimited privileges than the inhabitants of the States? Where, then, is the disfranchisement which has been so often complained of, and resounded in this debate? and in what does it consist? The inhabitants of this District are, in this respect, on a perfect equality with all others. If they have not the right of sitting in this House as members, the fault, if any where, is in the constitution, which has denied the District a representation, because it is a union of the States, and not of Territories.

But this view of the case has been supposed to be answered by the consideration that, on a removal from one State to another State, the person succeeds, in his new inhabitancy, to the same right of eligibility to Congress which he relinquished in the State from which he removed. The argument is founded in the notion that a person shall not be deemed to have renounced his original inhabitancy, because, by removing into this District, he succeeds to no continued eligibility, and shall retain, for that reason, this right, as if it had never been divested. If, however, his political rights vary, on his removal to a different State, and become enlarged or abridged, according to the positive institutions of the States to which, respectively, he may remove, there can be no force in this objection, or any reason why he should always carry with him the totality of rights which he



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may have previously enjoyed. His political rights change in all the States to which he may remove. He may, in some, become an inhabitant on a residence of a week; in another of a year. In one he may not, until after a certain period, be eligible even to the State Legislature; in another, he may not be eligible to a particular branch of the Legislature, without the quality of a freeholder, or to a fixed amount. He may not be eligible at all if belonging to some particular profession. All these rights may change in a day, on his removal to another State. Nor is there any uniformity, even in his personal rights, in all the States. His rights are enlarged or abridged, accordingly as he shall or shall not voluntarily change his domicil. They are necessarily subordinate to the sovereignty within which he may choose to reside. If, by removing to this District, he loses his inhabitancy in his original State, it is his free act, and he must submit to the disability in return for the advantages, if any, which he may have supposed himself to acquire by changing his previous residence. The whole question, therefore, results in the inquiry, whether the facts in the case do not show a change of domicil—whether, under all the circumstances existing in relation to the residence of the gentleman at this city, he must not be deemed to have been so established here as to create an inhabitancy in this District. Had his residence here been transient, and not uniform; had he left a dwelling-house in Massachusetts, in which his family resided for any part of the year; had he left there any insignia of a home, furniture, or any property which usually accompanies a household establishment—all, or any of these, would be deemed indications that his domicil in Massachusetts was not abandoned. Instead of any indications of this nature, we find him here for years discharging the duties of an office permanent in their nature; establishing domestic connexions in this city, and residing here with all the characteristics of a permanent inhabitant. Common sense seems to teach us that he is so; that he has emigrated from Massachusetts in search of better fortunes, which perhaps he has acquired. In forming my opinion, sir, I disregard the declarations which have been occasionally expressed by him, that he considered Massachusetts as his home—that this city was a temporary residence. Every man doubtless intends to change his domicil when better prospects elsewhere are presented. It is probable he came here for the enjoyment of the public office which he has held, and that, whenever it became convenient or necessary to leave it, he intended to return to Massachusetts, unless he could more beneficially establish himself elsewhere. All these vague and contingent intentions are entertained by every man.

Much has been said of the *quo animo* of the settlement of the gentleman at this place, and that we are to inquire

whether he has continued to cherish, in fact, during his residence, the *animus revertendi*. It would be a strange perversion of the rule to which gentlemen allude, in this respect, to accept the declarations of a party, or even his actual intention, in the face of the facts. The *quo animo* is an inference or conclusion of law, founded on fact. The law determines from the facts whether the domicil or inhabitancy has been acquired or not. If the facts are clear, and all the legal characteristics of domiciliation exist, the party is not at liberty to assume or dispense with his legal character at his own pleasure. If the facts were doubtful or ambiguous, perhaps the declarations might be called in aid, or the actual intention sought for, to determine what would otherwise be equivocal; but, in this case, the acts are of that clear and decisive import, that it would be dangerous to resort to extraneous circumstances. I can well imagine cases of residence in this city by public officers, under circumstances which might repel the legal conclusion of inhabitancy. Perhaps such may now exist. Every case must be judged of, however, by its own circumstances.

The circumstances of the case now before us call upon us to maintain with vigilance some of the most important principles of the constitution—principles which were established for the preservation of the purity and independence of the House of Representatives. We are not only asked to allow a seat here to one whose inhabitancy is not *bona fide* among his constituents, but one who comes from the Executive Departments. If this District is to furnish members for this House, it is the more dangerous, if they are to be educated under the immediate eye of their political patrons. The framers of the constitution intended that a Representative here should come from the bosom of his constituents; that he should live among them; be conversant with their feelings, their wishes, and their wants; that he should know their political principles, and be identified with the people whom he represents. They entertain no notions of that technical inhabitancy which has been set up here to fritter away the most salutary purposes of the constitution. The example of England was before them, where, under the form, though in mockery of representative Government, the Parliament was filled with placemen and pensioners. They never intended to turn the States of this Union into rotten boroughs, or to make this District the great and common rotten borough of all the States. There is something so pregnant with mischief to the character of this House in the doctrines which have been advanced, and so threatening to its purity, that I feel as if, in giving up or relaxing the construction of this part of the constitution, we give up the constitution itself, or render it an idle mockery. If there is any thing to be feared in this Government, it is the corrupting influence of patronage. The constitution considers all placemen of

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the Government as unfit to represent the people in the Legislative Department. I speak, sir, with no allusion to the gentleman whose seat is now questioned ; but all history and experience, our observation of human nature, and our knowledge of the motives and springs of human action, warn us to look with jealousy to any interpretation of this part of the constitution which shall approximate to a relaxation of its spirit and intention. If we sanction the principle that the incumbents of office here are to be universally eligible in the States, I beg gentlemen to reflect what an enormous and irresistible weight of influence may be brought to bear upon the State elections to promote the views of Government, and fill this House with the creatures of Executive power. The patronage of Government in the States will be devoted to this end. The connexions of men in office here are powerful and numerous elsewhere. The officers of your Government, scattered throughout the Union, are multiplying every day. Dependent on governmental favor, they naturally rally round the power which feeds them, and will be found subservient to its will. This vast machinery, when once organized and put in motion, will exercise a powerful control in the States, and the elections will feel the worst of all influence in a free Government. Candidates for this House, furnished from the departments here, will be supported by your marshals, judges, and hosts of custom-house and other Executive officers of the States.

The Treasury of the nation will sustain, through the dispensations of Executive bounty, this pernicious system. We have no reason to believe that, in all our future history, administrations may not be found which might avail themselves of such means to sustain their influence in this House. The only barrier to Executive power is here ; its only effectual restraint is in preserving the identification of this House with the people, and closing every avenue to the approach of Executive influence in our deliberations. Sanction the doctrine that the officers of the departments are eligible, and we may find here, at some future day, a semi-official cabinet, a bench of ministers, men who have merely laid aside the forms of office, but whose political feelings and partialities and obligations centre in the Executive will ; a packed Parliament ; men who are taught to look any where but where they should look for support, to the approbation of their constituents. Why has the constitution prohibited any officer of the Government from holding a seat in Congress ? It is, sir, because they are presumed to be politically unfit for legislation ; because the influence of patronage is often too strong to be resisted ; because their interests and partialities are not in unison with the mass of the nation ; and because all experience has proved that they are the most pliant instruments of the power which supports them in office, and dispenses the public emoluments. On principles adapt-

ed to discountenance the same political evil, and to preserve a strict congeniality of feeling between the Representative and the nation, the constitution has required his inhabitancy among his constituents. If those who serve the public here, in the more elevated offices of the departments, or the subordinate places of the Government, are not contented to enjoy the public bounty and public honor of their stations ; if they aspire to seats in the Legislature, the path is open and plain. Let them return to the States, and resume their original inhabitancy : let them submit to at least some purification in an atmosphere untainted by the influences of power. When returned to this House, let them enter our doors Representatives in heart, as well as in form, of a people whose confidence has not been beguiled into their support, and who feel that between them and their Representative there is some sympathy, some bond of intimate union, which connects their interests with his own. I hope, sir, that we shall establish, at this time, so far as our precedent can do so, an exposition of this part of the constitution, which shall not be misunderstood elsewhere ; which shall maintain a close alliance between the nation and this House, and shelter it from those evils which otherwise may threaten its purity and independence, and which shall preserve it uncontaminated by that influence which, whenever successfully brought to control its measures, or mingle in its deliberations, will render the whole system a mere mockery of free Government.

Mr. JOHNSON. Mr. Chairman : I should not have troubled the committee on this occasion, but from a deep conviction of the importance of the question about to be decided.

Having determined to submit my views at some period of the debate, I avail myself of the present moment, while the subject possesses both novelty and interest. The qualifications of a Representative to Congress are prescribed by the constitution of the United States.

At the period of his election he must have attained to the age of twenty-five years, been seven years a citizen of the United States, and an inhabitant of that State in which he shall be chosen. Congress, in the plenitude of constitutional power, has no right to increase or diminish these qualifications.

The question under consideration is confined to the sole inquiry whether, at the time of election, the sitting member was an inhabitant of the State of Massachusetts ; in other words, whether his absence, at that period, was temporary or permanent ; whether or not he intended to renounce his citizenship in his native State.

The inquiry involves a matter of fact as to the permanent home of the party ; and I shall attempt to establish the position that the intention to return, in cases of absence, constitutes the pivot upon which the decision must turn. If any other rule be adopted, a citizen may be disfranchised against his

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consent. In truth, gentlemen who substitute a different rule, are at war with themselves.

It is admitted by some that our foreign ministers and consuls, and the Secretaries of the different departments located within this District, continue to be citizens and inhabitants of the States from which they have been selected, and are constitutionally eligible as Representatives in Congress. Others deny this position, so far as regards the Secretaries of the different departments, and advance the principle that foreign ministers, consuls, and commercial agents alone, are embraced in that liberal rule of construction which prevents a forfeiture of citizenship and inhabitaney in their respective States; and that those only who compose this class during their absence, are eligible to a seat in this body. Both concur in the exclusion of a clerk, who is equally in the employ of the Government of the United States.

This diversity of sentiment, with those who oppose the sitting member, added to the doubts and difficulties expressed by other intelligent members, should impress us with the necessity of pausing, and deliberating maturely, before we disfranchise, for the time being, a portion of the citizens of Massachusetts.

In case of bribery or corruption, it is the solemn duty of this House to interpose, and preserve unsullied the representative character. But, to the honor of the Representative, and to the people, of that congressional district, no such practice is alleged or pretended. The choice was voluntary, proceeding from the impulse of unbiassed preference. We should then be cautious how we trample on the right of suffrage, and stifle the voice of the people. It is a right which should never be denied, except in cases where there is a clear and explicit constitutional inhibition; in cases where there exists no reasonable doubt of the ineligibility of the member returned. I have deemed it my duty to examine into the meaning of this constitutional clause, which, as a qualification for a Representative in Congress, requires that he shall be an inhabitant of the State in which he is chosen; and the result of that examination has been satisfactory.

Let us confine our attention, for a moment, to the definition which the report of the committee has given to the word "inhabitant." The general definition given confines it to "locality of existence."

As a necessary and irresistible consequence of this definition, *we* are all inhabitants of the District of Columbia, or we may be inhabitants of any State, Territory, or foreign country, where we may happen temporarily to reside in the transaction of private or public business. This is certainly a fair inference from the premises; but it is too palpable a violation of common sense to meet the sanction of this body.



What is the principle advanced in the report of the committee in relation to foreign ministers? They wisely abandon this rigid rule of construction, which declares that inhabitancy follows the person wherever he may have "local existence." They expressly admit that foreign ministers are not only citizens, but also inhabitants of their respective States, although transported to foreign countries, many thousand miles from their own shores; and, though they may have resided abroad for a number of years, no right has been impaired, nor any privilege abandoned, by this temporary absence. By this identical clause of the constitution now under consideration, they are secured in these rights and immunities, and eligible to a seat in Congress, although elected while absent in the service of the Government.

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It is the right of the people to make the selection, and Congress had no right of dictation. The sovereignty of the people is involved in the choice; and, upon the principle of representative Government, it would be usurpation to interfere.

Cases precisely in point, such as the election of foreign ministers during their absence from this country, have occurred. Such a case now exists in this body. No opposition has been made to it. All have yielded their full assent. To what conclusion does this principle conduct us? Doubtless the very principle which actuated the constituents of the sitting member. This is the principle for which I contend, and it has already been conceded.

We are now driven to the necessity of ascertaining the permanent home of the party. In cases of absence on public employment, or on private business, if doubts arise as to the intention of the party to return, we must resort to facts as the only safe foundation on which to rest our decision. In the nature of things it is impossible to avoid this inquiry. Was the absence permanent or temporary? I appeal to the candor of those who believe in the eligibility of the heads of departments located in this city, and of foreign ministers and consuls residing abroad, to draw the line of discrimination which would exclude the sitting member. I hope we are not prepared to adopt a liberal rule in relation to those who have been most favored by the patronage of the Government, and to exclude those who are less elevated, because their duties are more humble, though equally indispensable. The constitution recognises no distinction of rank, no exclusive privileges. Merit is the sole basis of distinction. As citizens, the head of a department and clerks are upon an equality. The head of the department has a larger salary, and may share more honor than the clerk who performs more of the drudgery of the business; but no constitutional advantage can be claimed in virtue of this public favor. Their tenure of office is the same. Each is subject to the will of his superior. Either may resign, or the



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offices of both may be abolished. Ministers and consuls, wherever located, are placed precisely in the same condition; and we are not authorized by the constitution to change the rule. Why we should attempt to vary it in this case, is unaccountable.

The greatest difficulty, as to the intention of the party, is this, that the sitting member is not surrounded with wealth; as to property, his condition is humble. If he were possessed of an extensive paternal inheritance, if he had left behind him a large domain and splendid domicile, it would not require the testimony before us to induce a belief that he intended to return to his native State. I believe, sir, the most incredulous would have admitted the fact. This is one of the disadvantages of poverty. I know how to sympathize with those who are not blessed with affluence. Sir, I will not disbelieve the positive testimony which declares the fact of his uniform intention, up to the time of his election, not to renounce his citizenship, and his determination to return to his home in Massachusetts. Believing, as I do, that he was constitutionally eligible, I feel more desirous that his rights, and the rights of his constituents, should be fairly presented, and impartially decided.

What are the facts in the case before us? The member is a native of Massachusetts; he is intimately acquainted with the policy and interest of that State; he is presumed to participate in the feelings of his immediate constituents; he has been reared up in the bosom of that society where his father still resides, and is bound to them by the strongest ties; he has been honored, on several occasions, with a seat in their State Legislature. A few years past he was appointed to discharge the duties of a clerk in the State Department, within this District; that trust was accepted, with the positive declaration that he did not intend to reside here permanently; that he did not intend to renounce his native State; and that Massachusetts was his home. During his residence here he boarded at a tavern, until within some few months previous to his election, and occasionally returned to Massachusetts. He purchased no property here; and that which he possessed, consisting of near eight hundred volumes, was left in that State. He has uniformly avowed his citizenship in Massachusetts, and has declined all participation in the concerns of this District. His constituents and himself had intercourse with each other, and understood, much better than we can know, the relations which existed between them. Considering him a citizen and inhabitant of their State, they called upon him to know whether he was willing to serve them in Congress. He yielded to their solicitation, and was elected by a majority of all the votes in the district. No person has claimed his place; but his eligibility has been contested, in a remonstrance signed by twenty-six persons only, and enclosed

under a blank cover to a member of Congress, and we are called upon to vacate his seat.

I contend that the words "citizen" and "inhabitant" are words of similar import, so far as this clause in the constitution is concerned. They are synonymous as regards eligibility to a seat on this floor.

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To render this subject more plain and familiar, I remark that continued residence is not essential to either; that there is a perfect analogy as to the permanence of the settlement.

The committee have resorted to Vattel's Law of Nations for a definition of the term "inhabitant." The essential part of it is in these words: "The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country." Is this the exposition that should be given to that term as used in our constitution? Permit me to illustrate this position by a plain case, in order to test its correctness. Suppose a citizen of an adjoining State should go into the State of Kentucky, and there take a temporary residence, in the transaction of private business, with the avowed intention of returning to his home, and a family that he had left behind him, would he be eligible to Congress from Kentucky during this temporary residence? I presume none would contend for such a doctrine. Nor need we apprehend the least danger that the people will ever become so regardless of their own interests as to elect a person under such circumstances. And why? For this important reason, that he would remain a citizen and inhabitant of the adjoining State. Yet the definition from Vattel, connected with "local existence," would contravene this obvious position.

I can never subscribe to such a doctrine. There must be an intention permanently to settle, to make him an inhabitant. Citizenship, being a term of the most extensive signification, includes inhabitancy. A citizen is always an inhabitant, within the meaning of the constitution. So far as regards the offices of the Federal Government, they stand on an equality. Such equality exists in the State Governments, except so far as State laws have required a certain period of settlement to confer eligibility. With this exception, they are entitled to the same privileges, and subject alike to the requisitions of the State authority.

Who has denied that the sitting member is a citizen of Massachusetts? If a citizen, he must be an inhabitant. He might forfeit his citizenship in Massachusetts, by a permanent settlement in another State, where he would immediately become eligible to Congress; and this might happen before his residence in that State had been of sufficient duration to entitle him, according to its laws, to all the rights of a citizen. Thus, a citizen is always an inhabitant, but an inhabitant is not always a citizen. No individual can properly be regarded as a citizen of one State, and an in-

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habitant of another. If he could be so considered, this gross absurdity would follow, that he would be eligible to Congress at the same moment from two different States; for citizenship cannot sink below inhabitancy; and it will scarcely be contended that a citizen is ineligible while the constitution confirms the inhabitant in the enjoyment of this right.

This brings us back to the only safe and constitutional rule, that, when absent from our respective States, whether on public or private business, the intention of the party is the proper subject of inquiry. We are triumphantly asked by the gentleman from New York, (Mr. STORRS,) if a territorial Government were extended to this District, and an individual, who had removed and married here, were elected a Delegate to Congress, whether he would not be an inhabitant, and entitled to his seat. Without qualification or explanation, I answer, he would. But, in return, I reply, if the party had uniformly claimed citizenship elsewhere, and invariably disclaimed any other than transient residence here, he would not be eligible.

Other cases are supposed, presenting more difficulty, where the intention of the party is problematical. Such cases do not properly test the principle advanced, but always fail in the important requisite of happy illustration.

I will state a case of frequent occurrence falling within my own observation. A friend, within my district, has purchased a farm in Louisiana, and cultivates it with the greater part of his force, in the growing of cotton. His family resides on his farm in Kentucky, and, during the year, he spends a portion of his time in each State. Is he an inhabitant alternately of these States, as he may occasionally reside in the one or the other? Or, is it necessary for me to say that, in accordance with the soundest rules of constitutional construction, he is a citizen and an inhabitant of Kentucky? The decisions of the first judicial tribunals in our country fully exemplify and sustain this position.

A citizen of Virginia has resided many years in Kentucky in the transaction of private business. He has uniformly claimed citizenship in Virginia; and, for the adjustment of his titles to land, suits have been prosecuted by him in the federal court. Objections were made to the jurisdiction of the court, and overruled, upon the ground that he was a citizen of another State. The great principle established in these cases, is this: that no person shall be compelled to expatriate himself, or to remove his citizenship. Shall we, then, compel the sitting member to renounce his native State against his own consent, and the consent of his constituents?

If this be a doubtful question, what should be our course? Leave it with the people. There is the safe deposite. Reverse their decision, and you may trench upon their rights. You may do violence to the most inestimable privilege—the privilege of self-government.

But it is said that we may establish a dangerous precedent, by which the influence of the Executive Departments will eventually prevail over the virtues of the people.

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Such suggestions are not the result of a cool, deliberate judgment. The Executive has the power to appoint members of this body to offices of the highest responsibility. If the constitution permits this, without danger to our liberties, much less is danger to be apprehended from the case under examination. And if, by possibility, Executive patronage could be so exerted as to procure the election of an individual to Congress, who was absent from his district, might not this influence be much more easily extended to an individual who was present at the canvass? In either case, the result cannot be dangerous while the decision rests with the people. I am not a convert to the doctrine that you are to save them from their own worst enemies, themselves. They know their own interests, and my confidence is based upon their virtue and integrity, and not upon these technical barriers. You cannot corrupt the great body of the people. In small bodies only corruption wields its force.

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The report of the committee affixes to the word "inhabitant" the definition which belongs to the word "resident." The journals of the convention show that the word *resident* was stricken out, and *inhabitant* inserted. This was done for some purpose. The word *resident* carries with it no definite idea beyond that of "local existence." At this time I am a *resident*, but not an *inhabitant* of the city of Washington.

Residence may be temporary or permanent. Inhabitancy is a stronger term; permanency is its essential characteristic. It means a settled home, with the intention to dwell and remain there indefinitely; and temporary absence no more affects it than it does citizenship. Inhabitancy does not depend on the contingency of owning property, but upon intention alone. Shall we, then, vacate the seat of the member on mere presumption against matters of fact?

The case of paupers has been noticed in the report of the committee; with what view, cannot be clearly ascertained. The object would seem to be to furnish a rule applicable to expatriation. The reference is unfortunate, and by no means correct. There is no analogy in the two cases. In relation to paupers, a rigid construction has ever been applied; but to the representative principle, a liberal construction has always prevailed.

The reason is obvious. The rights and interests of the people are advanced by a liberal construction in the one case, and a rigid one in the other. But, in the question before us, we need not resort to construction. The sitting member declares himself an inhabitant of Massachusetts, and his constituents recognise him as such.

The evidence is conclusive; the uniform declarations of

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the party ; the evidence of several persons of high character sustaining and corroborating these declarations ; his refusal to exercise the privileges belonging to the inhabitants of this place ; his boarding at a tavern ; having left his property in his native State ; the correspondence which took place between him and his constituents ; the manner in which he was elected. With this volume of evidence before us, shall we proclaim to his constituents that their confidence has been misplaced, in the election of a person who is alienated from their State, and a citizen of this District ?

The principle to be decided, though important to the sitting member, and his immediate constituents, is much more so to the people of this country ; for, to the free exercise of the elective franchise we must look for the stability and duration of this happy republic.

Speech of Mr.  
Owen.

Mr. OWEN. Mr. Chairman : I shall be pardoned by the House for giving the reasons which influence my course, when it is known that I am in the minority. Were I of the majority, at this stage of the investigation upon this subject, I would not trespass upon your time, because the world and posterity always presume that the majority is right. This presumption is correct, sir : and as this question will live beyond the existence of this Congress, and is to be handed down to those who follow us, as a precedent, with it I wish to go the reasoning upon which my mind compels me to oppose so large a majority. Sir, I do not rise with the vain hope ( for such it certainly would be ) of endeavoring to change the opinion of this House, which has been so clearly manifested. It is true that I should be much pleased were the majority to go with me, but not so, if induced by any power I possessed, when their settled opinion was to the contrary. I am the more anxious upon this subject, sir, because it is one of constitutional construction, because it is one that strikes at the very root of the democratic principle of our Government. Were it upon a matter of expediency, or of mere policy, I should be almost indifferent on which side of this question I should be found. These, sir, are settled by opinion, by speculation, and there is scarcely any matter of policy, of deep national concern, that has not been tested by the experience of other Governments ; and rare, indeed, are the instances arising from the peculiar formation of our Government, where this assertion will not hold good. But, sir, on the other hand, in ascertaining what the principles of our Government are, nothing of experience or history beyond our own time can afford us any light to direct our course. While the investigations of subjects of this kind are the most intricate that can be presented to an American legislator, they are, at the same time, the most unique, and dependent upon the powers of the mind, unaided by experience, or influenced by precedent, for their correct decision. Questions arising upon the



principles of our Government are to be examined by the charter of our liberty; we need not go beyond; to know what are its provisions, is knowing the principles of our Government. How are they to be known? By the rules, most assuredly, used in giving construction to the prescribed rule, by the sovereign power. We cannot, then, with too much caution, approach a subject, in the investigation of which is involved the two main features of our Government; that is, the extent to which power is delegated, and the limitation beyond which it is restricted by the will of the sovereign power of our Government.

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The people (for happy it is for our country that in them is vested the supreme power) have, in prescribing our great rule of action, the constitution, not only limited those by them appointed to administer the Government, in the exercise of power, but have restricted themselves in the discharge of duties which they have to perform. To us, sir, the responsible duty of preserving the constitution from violation is confided. We are the sentinels of the people's liberty. Whenever, therefore, the people, in the exercise of privileges reserved to themselves, act within the restrictions imposed by our constitution, their act should be sovereign and uncontrollable. When they go beyond these restrictions, it is our duty to restrain them. At the same time that we guard against others, to preserve the purity of our constitution, we should watch over ourselves, and never in the least transcend our delegated powers.

Pardon me, sir, for here remarking, that, with no little concern, have I, in the progress of our Government, within my limited observation on public concerns, discovered, as I thought, that, in any case where the constitution was intended to limit the power of Congress, this branch of it, at least, to sustain its power, has ever given the most liberal and the greatest latitude of construction. Even, sir, during this session, have constitutional questions been agitated, nay, thoroughly discussed, and the principles upon which they have been settled, are, that it should be liberally construed to effect and secure to the people of this nation the great purposes for which it was adopted—the prosperity of the nation and the happiness of the people; but, on the other hand, I do fear, were I to assert that Congress, at least this branch of it, in ascertaining the power reserved by the people to themselves, in the constitution, that the most rigid and limited construction is given to support and sustain the restriction, that facts could be adduced to sustain its correctness.

Let not this case present us authority to support such a declaration; let us pursue the same rules of construction in testing the powers of the people under the constitution, as we do in ascertaining our own. Another principle, and I will endeavor to apply the case before us to these principles,



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which I think no one will doubt the correctness of. It is this: in giving the construction to the acts of sovereign power, the presumption is in favor of sustaining such acts; being understood to be right, to be strictly legal, until the contrary is proved. So it is with individuals in the discharge of lawful acts; the presumption is in their favor, until removed by evidence, by facts to the contrary.

What, then, is the question before this House? It is to concur in the report made by the Committee of Elections, which is to be settled upon the adoption or rejection of this resolution submitted by the committee, "That John Bailey is not entitled to a seat in this House." To sustain this resolution, the committee, though they have laid before you a long and elaborate report, submit the proposition that Mr. Bailey "is ineligible, not being possessed of those qualifications which, by the constitution of the United States, are indispensable to the holding of a seat in Congress." Under this broad proposition, none but a single allegation is submitted to sustain it, and upon which the whole report is bottomed, that is, that "because, at the time the election was held, at which the said Bailey was supposed to have been chosen, he was not an inhabitant of Massachusetts, but then was, and for many years before had been, and still is, an 'inhabitant' of the city of Washington, in the District of Columbia;" notwithstanding the broad proposition that Mr. Bailey was "ineligible" for the want of "qualifications," but the single qualification alleged to be wanting is, habitation within the State from which he is chosen. The whole question then depends upon the single point, was Mr. Bailey a resident of Massachusetts, within the purview and spirit of the constitution? The committee have said that he was not, and to maintain this assertion, what is the testimony adduced?

The first is the certificate of the Governor of Massachusetts.

2d. A memorial by certain inhabitants of the district of Norfolk, in the State of Massachusetts.

3d. A statement of Mr. John Quincy Adams, Secretary of State.

4th. An affidavit of Mr. Charles Bulfinch.

And, lastly, a statement made by Mr. Bailey himself to the committee.

The certificate of Governor Eustis only states that, on a certain day, John Bailey, Esq. "was chosen by the people of this commonwealth, (Massachusetts,) legally qualified there for a Representative to represent them in the Congress of the United States of America," &c. &c. This establishes the fact of his election.

The memorial prays that Mr. Bailey be not admitted to a seat in this House, "because," by the first section of the first article of the constitution of the United States, it is

provided "that no person shall be a Representative who shall not, when elected, be an inhabitant of that State in which he shall be chosen," and alleges the fact that Mr. Bailey was not an "inhabitant" of the State, but of the District of Columbia.

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Mr. Adams states that Mr. Bailey was a clerk in the Department of State; that he continued to act in his station until after his election; that he was an inhabitant of Massachusetts, in the district he is now chosen to represent, at the time of his appointment of clerk. His residence during the time he held the office of clerk has been within the District of Columbia; he always considered Massachusetts as Mr. Bailey's home, and his residence in the District temporary, in the discharge of official duty only; gives his opinion that Mr. Bailey was *eligible*, upon the general principle of national law, that the "*animus revertendi*," or intention of return, constitutes the test of domicile; and to sustain this, at the request of the committee, many instances are submitted, sustaining this principle in practice in Massachusetts.

The affidavit of Mr. Bulfinch establishes the residence within the District, with occasional absences on visits to Massachusetts—boarding at a public hotel until marriage; after which time, in the family of his wife's mother—represents that Mr. Bailey never exercised any privilege within the District—never held an office of the District, within his knowledge.

Mr. Bailey's statement corroborates the statement of Mr. Adams and Mr. Bulfinch, and adds, that he ever considered Massachusetts his home; that, within his district, in that State, was the seat of his property, consisting of a law library; that it had ever remained there, and that he considered it his home; alleges that he never held any office in the District of Columbia; that he always avoided the exercise of privileges within this District—never paid a tax, always considering Massachusetts his place of abode.

These, then, Mr. Chairman, we take to be the facts involved in this case, and none other can be brought into this investigation; none other having been submitted by the committee. Sir, if this resolution had not been submitted, but the facts reported alone submitted, it does appear to me that precisely the opposite proposition must, necessarily, be founded upon such evidence; let us for a moment examine, and see if this remark is not entitled to some weight. The certificate of Governor Eustis proves the election—in my mind, sir, it proves more, so far as this is a question of fact, at least; it is the duty of the Executive of Massachusetts, by the authority of the State, to certify the result of a constitutional discharge of duty by the people of that State; that duty is the election of a member of Congress; this officer acts under oath in the discharge of official duty, and this is a part of that official duty. It is to be pre-

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sumed, then, sir, that he has not certified to us that which the law prohibits; it is to be presumed, sir, that the constitutional qualifications were possessed, the law presuming in favor of the correctness of the act of the certifying officer; so much then for the Governor's certificate. But the constitution correctly secures to each branch of the General Legislature the sole and exclusive privilege of judging and determining on the "elections, returns, and qualifications of its own members;" this, then, sir, and this alone, prevents the certificate of the Governor from being conclusive; but still, sir, the presumption exists, and that which, in almost all other cases of like discharge of official duty, would be conclusive by reason of this provision (universally admitted to be a wise one) of the constitution, is not so, unless supported by the circumstances of the case. What, then, are these circumstances? This brings me to the other facts submitted by the committee, all of which may be summed up in a very few words, there being none which conflict; they are, that Mr. Bailey, in discharge of official duty, resided within the District of Columbia at the time of his election, before and since; that his residence here was a temporary one; and that, at the close of his official duties, which could at any time take place at his own will, or the will of his superior, he intended to return to his abode in Massachusetts; this, sir, is the evidence, to say nothing of the opinion of the Secretary of State, than whom there are but few more learned jurists. But, sir, how have the committee, and gentlemen who coincide with the opinion of the committee, treated this testimony? Why, sir, I must say that they have used such parts as supported their opinion, and seem to have proscribed those which conflicted with it. This to me is an unusual mode of weighing testimony, even in courts of civil or criminal jurisdiction, where testimony is received under the most rigid rule. This course is inadmissible in all statements touching the same matter; the whole mode must be received, or the whole rejected; the reason of this rule is obvious; for, if such parts are credited as lead to a certain conclusion, and the remainder rejected, what reason exists for crediting that which is retained? But here it is related that many of these facts are from the confession of the individual interested. Sir, I have been under the impression that the confessions of individuals, when made without motive, were entitled to weight even in courts, though such confessions were to the benefit of the party. It is universally admitted that the intention or design with which any act is performed, gives the character to the act; for all acts of any shape or character, in any performance, are designed by the God of our nature, and so secured by the regulations of society, to express and declare the intention of the person or persons doing them. Can we suppose, for a moment, sir, that Mr. Bailey was ever actuated by motive in uniformly



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disclaiming this District as his *home*, and declaring his intention to return? Did he anticipate this event that made him firm to his purpose in inducing all about him to believe that he considered Massachusetts his residence? Was it with the same spirit and design that he disclaimed the exercise of privileges within this District? Nay, sir, was it for this purpose that his fortune, his estate, (a law library, if you please,) was studiously kept at the place that he called his domicile? Sir, if these things can be believed, they are of rare occurrence indeed, and I am at a loss whether to admire the stability and firmness of character displayed in pursuing his fixed purpose, or to continue his hypocrisy and plans of dissimulation, in order to accomplish an illegal, unconstitutional, and unworthy act. Sir, I must discard this view of the subject; it is unreasonable; it is against common sense; and I am forced to believe that Mr. Bailey did not consider this District his home; that his uniform declaration of his design to return was without motive, and that Massachusetts was his domicile; but the circumstance of his library being at his home, is treated with levity. I suppose, because it is not valued as a cotton or sugar plantation. Sir, principle is not to be established by dollars and cents. If in the latter case the property identified the home, with as much correctness will it in the former. These, then, are the circumstances. Do they destroy the presumption in favor of the legality or constitutionality of Mr. Bailey's election, as it is duly certified to us? For my part, I think not; although they show a residence out of the State, they also show that that residence was temporary, and that his permanent habitation was in Massachusetts. We must believe that Mr. Bailey did intend to return: if so, we must believe that his absence was intended to be temporary, and this does not destroy the right of citizenship, the right of inhabitancy. Against the loss of privilege in this way, many of the States have made express provisions: in others, I consider it provided for by the spirit of our Government, derived from international law. And, sir, that such is the spirit and practice of the Federal Government, no one hesitates to admit. Sir, it is under this principle that our communications with foreign Governments are conducted; but this case is different. Gentlemen tell us that we must adhere to the literal definition of the term inhabit; that it is, to use the phrase grown trite by repetition, "locality of existence." Sir, we do not in every case, nay, we do but in few, confine ourselves to the literal definition of terms; we are constantly, nay, often, by law, giving constructive definitions to terms that are in many instances in direct opposition to their literal definitions. Sir, it is upon this principle that a man in Europe is in Louisiana or South Carolina; that a man in Great Britain is in Pennsylvania. This, sir, for wise purposes, arises from a constructive definition of terms, which constructive definition is sanctioned by



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law. If, then, there is no legal constructive definition in this case, by positive enactment, I do say that a rational constructive definition, if not within the letter, but within the spirit of the principles of our Government, when not in contravention to existing law, is law, and that if ever literal definition is deviated from, we are justified in deviating when supported by reason and not prohibited by law, in order to support and give effect to the free exercise of the sovereign power, the will of the people.

But we are told that in this case we must adhere to the letter ; that although in other instances it is not expedient to do so, that in this we must. It is even admitted that the heads of our departments claim their domicils or inhabitancy in the States from which they were appointed ; and that their residence within this District does not deprive them of any of the privileges they possessed in their respective States, and that the authority from which this is derived is as positive as if prescribed by statute, or engrafted in your constitution. Sir, if this is admitted, the question is decided ; for the chief clerk in the State Department is an officer of Government, so made by law, and the same principle that sustains the one case will hold good in the other. I need not make reference to authority to support this position, this having already been done with great energy and ability by the honorable gentleman from Louisiana, (Mr. BRENT.)

Again : one honorable gentleman (from New York, I believe) has said that Mr. Bailey was not eligible, because, if this District was entitled to a Delegate or Representative upon this floor, Mr. Bailey could be that Delegate or Representative. Sir, this does not, cannot, apply with any force in this case. Your District, sir, is subject to the immediate control of, and its municipal regulations are prescribed by, the Congress of the United States ; and if it was provided by law that such Delegate should be an inhabitant of Massachusetts, then Mr. Bailey could make his election whether to represent a district in Massachusetts or the District of Columbia, if chosen to do both. It is unnecessary to make any other reply to this kind of argument. But the House will pardon me while I notice another remark made by that honorable gentleman. Sir, he says we cannot be too cautious in examining the qualifications of the members of this body. In this I do most heartily concur with that gentleman. Yes, sir, the purity of all our institutions, of every department of our Government, depends upon the purity of the Legislative Department. He brings to our view the corruption of other Governments, “ tells us of placemen, corrupt ministry, and seats in Parliament from rotten boroughs.” Sir, these are remarks, though to my mind entirely unconnected with, and, by no possibility, can have any bearing on the case on which we are now deliberating, that I do not object to hear. Their frequent repetition keeps fresh in our

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remembrance the cause of our being a free people. They bring forcibly to the observation and attention of this age, of this generation, that which our forefathers saw, that which they felt; and that which they resisted. Yes, sir, wherever there is corruption, liberty is in danger, and the first and smallest appearance of its approach, under any shape or disguise, to any department of this Government, should be scouted, should be held up to the world and our posterity as a beacon to guard them against danger. But, sir, while we fear and detest corruption on the one hand, let us beware lest our anxiety to avoid it should lead us into error; let us beware lest, while we endeavor to provide against this in the cabinet, we become ourselves the usurpers. Let us, when we provide against placemen and members of Parliament from rotten boroughs, beware lest we usurp the elective franchise, the only sure basis of the people's liberty. Sir, if in this we are to exercise unlimited power and control; if we can limit and restrain the people in the free exercise of their own free will, in choosing those who are to rule, the time is not far distant when placemen, created by us, will dictate to the American people, and we ourselves be the members of rotten boroughs, and the corrupt ministry that we now so much deprecate and carefully provide against.

Sir, gentlemen apprehend danger from cabinet patronage in securing seats in Congress from corrupt sources. To me, sir, there does appear to be as much danger to be apprehended, if public service is to destroy constitutional disqualifications, from cabinet patronage, in putting down opposition to a favorite asking for a seat in Congress, by holding out and proffering the lure of office. Sir, there is as much danger in the one case as in the other; and that which is to come from the free exercise of the will of the people is infinitely the least to be apprehended. Gentlemen should, when they contemplate on the practices of other Governments, by which freedom and liberty are lessened by a cabinet and ministry, view the other side of the picture, and remember that even a Parliament has been arrayed against the people, and that from this source liberty received a wound that time cannot heal. Can this be a cause of an American Parliament being against the people, and endeavoring to restrain them in the exercise of those constitutional privileges reserved to themselves? Sir, it may lead to this. Yes, the freedom enjoyed by the people of this Government, in the exercise of their elective franchise, is the palladium of our liberty: weaken this, and you destroy the distinction that exists between the principles of our Government and those in which the sovereign power is in a King and ministry; and the people but their minions. These are pictures drawn by the imagination of gentlemen, but, sir, they may be realized. Let us, therefore, choose rather to rely upon the virtue and intelligence of the American people to preserve the purity of the principles

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of our Government, rather than by restraining them by *parliamentary* acts. Our liberty is safe in their hands ; change its guardian, and it is lost forever.

Speech of Mr.  
W. Smith.

I thank the House for its indulgence, but I must be pardoned for saying that the more I reflect upon this subject, the more I am contented to vote with the minority. Therefore, the "*animus revertendi*," the avoiding of District privileges, his estate being in Massachusetts, his residence here being only temporary, and permanent inhabitation being in the contemplation of the constitution, and the people's electing him, constrain me to say that Mr. Bailey is entitled to his seat.

Mr. WILLIAM SMITH, of Virginia, remarked that this case submitted but a single proposition for the consideration of the committee. The right of the sitting member to a seat in this House is contested, upon the ground that he was not an inhabitant of Massachusetts at the time of his election. The language of the constitution is explicit, and if he were not an inhabitant of that State when elected, unquestionably he is not constitutionally and rightfully here. But, Mr. Chairman, before we deprive him of his seat, we ought to be satisfied, beyond the possibility of rational controversy, that the letter and spirit of the constitution have been violated by his election. What, sir, are we required to do ? The Committee of Elections, after a very patient and laborious investigation of the facts and principles of this case, conclude an able and elaborate report, with the declaration that the sitting member is not entitled, and the House is called upon to yield its assent to this result. However much we may confide in the intelligence and good sense of the committee, our agreement will be withheld, if a reasonable doubt be entertained, and this for reasons which, to my mind, are obvious and conclusive. The sitting member is decidedly the favorite of the people of his district. He has been sent here by an overwhelming majority, after a full and fair expression of the public will, and we all know that there is no one claiming the seat which is now sought to be vacated. Should he be excluded, therefore, what will be the consequence ? His place will not be immediately supplied. Possibly his district may be unrepresented the balance of the session, and we *may* do violence to one of the most inestimable privileges of an American citizen. What right, in this country, is held more sacred, dearer to the heart of every freeman, or of higher value, than the right of suffrage ? Emphatically none. In the possession of this right, the humblest member in the community feels himself elevated to an immeasurable distance above the degraded condition of the miserable slave of power. No matter what may be his pecuniary circumstances ; no matter how limited his share of the good things of this world, he feels, thinks, and acts as a freeman, and will always be found prepared firmly to resist the slightest invasion of a privilege secured to him by the constitution and laws of his country, and which he

knows how to value. It befits us, therefore, Mr. Chairman, to approach this great right with extreme caution and deliberation, and let us beware that we do nothing by which its efficiency may be impaired.

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With these few preliminary remarks, Mr. Chairman, I will now proceed to offer, very briefly, some reflections upon the question submitted for our decision. And what is the question? It is this: Was the sitting member an inhabitant of Massachusetts at the time of his election? The investigation of this question naturally and necessarily presents another inquiry. *Quo animo*, did he leave Massachusetts, and take up his residence in the city of Washington? Did he *intend* forever to abandon his native State, and settle permanently in the District of Columbia? This is emphatically the question. Is it, can it be doubted? If it be, a few remarks, I think, will suffice to prove, incontestably, that such is the true character of the question to be decided. Let me put a familiar case, and one of every day occurrence. An inhabitant of Maryland, Virginia, or any other State in the Union, possessed of but little visible property, goes beyond the boundary line of his State on public or private business, or for any purpose, no matter what. Will it be contended that, by this act, he loses his inhabitancy in the State from which he goes? Surely not. It must be conceded that, in such a case, the individual is uniformly considered, during his absence, as an inhabitant of that State from which he is thus necessarily absent. But upon what principle? Clearly upon the ground that he does not *intend* to exchange his original residence for a permanent abode elsewhere. That this is the principle upon which he is regarded, *during his absence*, as an inhabitant of the State from which he goes, is too palpable to need a single remark. In support and illustration of this position, Mr. Chairman, that intention constitutes the true and only legitimate test of inhabitancy, I will, with leave of the committee, present some additional examples. A citizen and inhabitant of Pennsylvania, distinguished for his enlightened and accurate views of the true policy and interests of this Government, is appointed by the Executive a minister to some foreign Court. The appointment is accepted. He leaves this for the foreign country. After an absence of six, eight, or ten years, the people of Pennsylvania, in consideration of his long and useful services, elect him a member of either branch of the Congress of the United States: with what propriety could it be said that he was not an inhabitant of Pennsylvania, and, therefore, ineligible to a seat in the National Legislature? Not even a plausible objection could be made to his right. He would unquestionably be entitled to it; but upon what principle? Obviously upon the ground that, by accepting the appointment, he did not *intend* to settle permanently in the foreign country; an intention indicated by the nature of the appointment, the character of the service

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tinued.

in which he engaged, and the political condition of the country to which he is sent, compared to the peculiarly happy and prosperous situation of this nation. If, then, in the case supposed, intention constitutes the true test of this term, *inhabitant*, why should it not in the case now under the consideration of the committee? Can the two cases be distinguished? In what particulars do they differ? In both the individuals were employed in the service of the Government, equally absent from their respective States, and holding appointments alike *temporary* in their nature. No substantial difference, Mr. Chairman, can be shown, and it does seem to me that a common principle ought to be applied to cases whose essential features are the same. The history of the State from which the sitting member comes, furnishes some cases illustrative of the principle for which I contend, to one of which, only, will I now call the attention of the committee. It appears, from the document which has been laid upon our tables, that the constitution of Massachusetts requires, as a necessary qualification for a Senator in the Legislature of that commonwealth, inhabitancy for five years immediately preceding his election. I have not examined the constitution of that State, but I presume the provision has been correctly quoted. It also appears, from the same document, that the Secretary of State, in answer to one of the interrogatories propounded to him by the committee, states that he returned to Massachusetts from his foreign mission some time in 1801, and in 1802, after a short residence of six or eight months only, was elected a member of the Senate of that State. What principle was it that entitled the Secretary to a seat in that body? What the test of inhabitancy in this instance? Unquestionably the *animus revertendi*, the intention to return to his native State. It was the continued existence of this intention that prevented, during his absence, the loss of his political privileges. But, say the committee, this, and other cases of a similar character in that State, for anything that appears to the contrary, passed *sub silentio*, and therefore no principle was settled. To this I have but a single remark to make. If Mr. Adams had opposition, the feeling in relation to such matters which prevails in the section of country from which I come, and, I apprehend, in every other State in the Union, would, no doubt, have impelled the rival candidate to contest his election, had there been the slightest prospect of success. But, whether he had opposition or not, or whether his election was contested or not, to my mind it is perfectly clear that the Secretary took his seat in the Senate of Massachusetts, in 1802, upon a principle entirely defensible, and to the soundness of which I most heartily subscribe. It has been said, Mr. Chairman, that this case is distinguishable from the one now under the consideration of the committee, upon the ground that Mr. Adams, as minister, carried along with him the sovereignty of the nation, and, therefore, was to be con-



sidered an inhabitant of Massachusetts. The premises are admitted, but such a conclusion is utterly denied. Let it be conceded, for a moment, that, as he carried with him the sovereignty of the United States, therefore, he is to be regarded, in reference to his rights in this country, as a citizen and inhabitant of the *United States*, with what propriety, permit me to inquire, can it be contended that, for the same reason, he continued to be an inhabitant of *Massachusetts*? What, sir, an inhabitant of *Massachusetts*, because he carried along with him the sovereignty of the *nation*! The idea is too refined for my comprehension, and, if I am not greatly mistaken, would startle any man of plain, unsophisticated mind. With as much propriety might it be said that he who speaks the French language is, therefore, a Frenchman, or he who wears a coat made of foreign cloth is, therefore, a foreigner. The attempted distinction cannot be established upon any principles of fair and correct reasoning. The position I maintain, Mr. Chairman, may, I think, be also sustained and illustrated by reference to the proceedings of the federal convention, by which the instrument was framed under which we are now deliberating. It is admitted that the draught of the constitution, reported by the committee in 1787, employed the term *resident* to indicate one of the qualifications necessary for a member of Congress, and that this draught was subsequently amended by the substitution of the term inhabitant. But for what purpose? After the lapse of so many years it is impossible to ascertain, with any sort of precision, the considerations which operated upon the convention in making this alteration. The inducement, therefore, which led to the change, must necessarily be a matter of speculation. This convention must have had some motive in making the amendment, and we cannot attach the same meaning to both terms, without attributing to them an idle act. My own impression is, (and, in this opinion, I am supported by the more matured and better informed judgments of others,) that the amendment was made under an apprehension that a literal interpretation of the word *resident*, might prevent the election of any man, however enlightened, however distinguished for talent and information, unless he was living, residing, and actually present in the State at the moment of the election. To guard against this result, which the wise men who framed the constitution never could have contemplated, *inhabitant* was inserted, under a sound construction, whereby any one absent from the State, but having the *animus revertendi*, and possessing the other qualifications indicated by the constitution, may be elected a member of the Congress of the United States. The Committee of Elections, in their report, have said that the word inhabitant comprehends merely the simple fact, *locality of existence*. Well, sir, according to this new and very contracted exposition of the term, we, who are here assembled,

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19th Congress,  
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tinued.



1824.  
18th Congress,  
1st Session.

Speech of Mr.  
Campbell.

Mr. CAMPBELL, of Ohio, said most of the gentlemen who had preceded him in this discussion, considered the question one of great moment. With them he was disposed to concur in opinion, and would say, as it involved the construction of an important clause of the constitution, it deserved a full and patient investigation. If any question, said he, agitated during the present session, had, more than another, excited in his bosom an anxiety to arrive at a correct conclusion, it was the one now under consideration.

Mr. C. said the gentleman from Connecticut (Mr. Foot) has assumed a position which, he thought, was altogether untenable. He has gone so far, if he was correctly understood, as to intimate that the constituents of the gentleman, the right to whose seat is now disputed, are much more competent to decide on his qualifications than we are.

[Mr. F. explained, and said he did not wish to be understood as denying the jurisdiction of this House.]

Mr. C. said he supposed the gentleman had used language which, upon reflection, he would be inclined to qualify. The gentleman from Massachusetts (Mr. FULLER) who addressed the committee yesterday, advanced a similar opinion. He has informed us the electors of Norfolk district had long been acquainted with the sitting member. He had been born and educated among them. As his residence here had not suspended his intercourse with them, they knew his sentiments. They believed him eligible, and gave him their votes; that, therefore, this House ought to acquiesce in their decision.

[Mr. F. explained, by saying the judgment of his, Mr. Bailey's, constituents, was entitled to much consideration.]

Mr. C. said he thought so too, but he would protest against the obligation of such a judgment. It could not be binding on us. It might awaken our vigilance, and induce us to approach a decision with increased care. The recognition of a different doctrine would leave but little to the performance of this body, under that clause of the constitution which gives it authority to judge of the qualifications and returns of its members. For what purpose is this House required to pronounce sentence in any case of contested election, but particularly in one involving qualification, if the constituents of the returned member be the most competent judges? We constitute the legitimate tribunal; and he, said Mr. C., was, for one, prepared to perform his duty.

The gentleman from Massachusetts (Mr. F.) informs us the member from the Norfolk district had, after an absence of four years from the State, been elected a member of the Massachusetts Legislature; that gentlemen, highly respectable for talents, when consulted, declared him eligible, although the constitution of that State required a year's residence. These facts are urged with great force in favor of the member's eligibility to Congress. Upon examination, it will be found nothing conclusive can be deduced from them.

of removing all possible doubt upon this subject, it may not be improper to advert to one or two other additional circumstances. An extensive and valuable library was left behind. This fact can only be rationally accounted for, upon the supposition that the sitting member never contemplated a permanent settlement in the District of Columbia, but always intended to return. If he did not so intend, is it not remarkable that his books, which constituted the greater portion of his visible property, were not either sold or brought on to this place? The one or the other course, in relation to his library, would most certainly have been taken, had he intended to settle permanently in this city, and his not adopting either is a pretty strong and conclusive fact to show that such was not his intention.

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W. Smith, con-  
tinued.

These circumstances, Mr. Chairman, taken in connexion with the facts, that Mr. Bailey has never, in any manner, participated in the privileges and burdens of the corporation of Washington, or purchased a foot of ground in the city, although in the annual receipt of \$1,600 for his services in the Department of State, have conducted my mind irresistibly to the conclusion that he never contemplated a permanent settlement in the District of Columbia, and, therefore, upon the principle which I have been endeavoring to enforce, is clearly entitled to a seat in this House. A remark or two more, and I will close my views on this subject. The Committee of Elections, in their report, have said that the constitution contemplates an identity of interest and feeling between the constituent and Representative. Be it so. The position is undeniably true—but is it possible seriously to believe that this feature in the constitution will be violated by permitting Mr. B. to retain his seat, when it is recollected that he is a native of Massachusetts, that he was born and raised among the people he now represents; that consequently he is intimately acquainted with their character, feelings, and interests, and that, having been honored with the most important and responsible office within their gift, he must, therefore, feel the very strongest attachment for them? I think not, sir. This feature will remain untouched, should Mr. B. be permitted to retain his seat in this House, and I cannot but think that those who entertain the opposite opinion indulge ideal and unfounded fears. I would not approach the constitution of my country irreverently. I would not invade a single provision in that sacred instrument, for the purpose of attaining any object, however desirable; but, as I can see nothing in it which requires that the seat of the sitting member should be vacated, as I would not lightly interfere with the free and unbiassed exercise of the elective franchise, and as I have great confidence in the virtue and intelligence of the people, I feel myself bound, by the sternest mandates of duty, to vote for the proposition submitted by the gentleman from Louisiana, to reverse the report of the committee.

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35th CONGRESS,  
1st Session.

Speech of Mr.  
Campbell, con-  
tinued.

classed with aliens. Yet gentlemen liken the case of the sitting member to that of a minister to a foreign Court. Mr. C. said the similarity, if any existed, had, so far, eluded his observation. Indeed, it was plain to him there was none. The member from Norfolk, by leaving his native State, and locating himself here, has lost nothing. His immunities are not affected by the migration. What he loses there, he acquires here. If he ceases to be eligible to office in Massachusetts, he is compensated by the acquisition of correspondent privileges in this District. At all events, no one can say, with any expectation of being credited, that he would not have been eligible had he crossed the river into Virginia, and resided there six years, as he has done in this city. The gentleman from Illinois (Mr. Cook) has favored the House with an ingenious argument, but which, when tested, will be found inconclusive and unsatisfactory. He says we have two forms of Government, meaning the State and Federal; that, to carry on the operation of the latter, the citizens of one State are sometimes sent into another, or into a Territory, in the character of officers; and that to say they lost the rights of inhabitants of the States which they might leave, would be doing violence to State rights, as each State had an interest in the service of its citizens. Mr. C. said this had frequently been the case, and the officers continued in the State or Territory, and enjoyed all the privileges of citizens; as in the case already mentioned, what was lost at one place, was fully made up at another. Correlative rights press upon the emigrant, and he may enjoy them if he chooses. To make the case still more intelligible, Mr. C. said he would suppose an inhabitant of the State of Illinois were appointed a register of a land office in Ohio, and were to move with his family there. What would be his relation in regard to the two States? Certainly his connexion with the first is severed, and a new one formed with the latter. Certainly he ceases to be an inhabitant of Illinois, and becomes a citizen of Ohio. To affirm the State he left is still entitled to his allegiance and service, would give a negative to the right of locomotion, a right which we see exercised every day without complaint, or any supposed prejudice to the right of the States.

The gentleman from New Hampshire (Mr. Livermore) contends if the word *inhabitant* be properly defined by the Committee of Elections, no person can be eligible to Congress who is not *actually* in the State on the day of election. This, Mr. C. thought, was putting an extreme case. Such an idea he supposed no member whatever entertained. He was certain even the term "locality of existence," which had been examined with so much attention, was not intended to convey this sentiment. It could not be said we were not inhabitants, in the constitutional meaning of the term, of the States we respectively represent, although in the Dis-

trict of Columbia. To declare we would be ineligible, should an extra session require our attendance here at the period of an election, would be an absurdity without comparison. A case may be put to operate equally strong against the gentlemen. The public architect came to this city six or seven years ago from the State of Massachusetts, with his family. He owns real estate, has built himself a house, and is entitled to all the privileges of a citizen of this District. Is he an *inhabitant* of Massachusetts? The answer is easy; or, Mr. C. said, he would put a stronger case. He knew a clerk who emigrated to this place more than twenty years ago from Maryland, had reared a family, and was the owner of houses and lots; and appeared located for life. Would the gentleman say he was eligible in the State from which he came? Surely not; or else it must be admitted a man can, at the same instant, enjoy the same privileges in two or more separate and distinct jurisdictions. Cases may be supposed, which prove nothing but their own folly. Mr. C. said his opinion was, we ought to give the word *inhabitant* a rational meaning—it ought to be construed to a common and judicious intent—not so as to impair rights, yet so as to guard against the evils designed to be prevented, which have been ably exposed in the report, and by the gentleman from New York, (Mr. STORRS,) and then applied to the facts as they have been disclosed.

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15th Congress,  
1st Session.

Speech of Mr.  
Campbell, con-  
tinued.

Such is the condition of man, such are his wants and necessities, as to require him to be employed in some avocation. To obtain a livelihood, the means are diversified as if to suit the versatility of genius. Some prefer a maritime life; others choose agricultural and mechanical pursuits; others seek the learned professions; and not a few depend on public favor for subsistence. The clerks of the different departments we know depend almost exclusively on their salaries for support. A clerkship is one of the many ways of obtaining a living. It was the sitting member's preference for the last six years, within which, we are informed, he intermarried. It seems to me, said Mr. C., a man's ordinary business indicates the "locality of his existence." What answer would a plain, common-sense man, acquainted with the circumstances of this case, give to this question? Of what place was the sitting member an *inhabitant* at the time of his election? Would he not say, of the District of Columbia? Let us say so, too, and support the resolution submitted by the committee.

Mr. HALL, of N. C. Mr. Chairman: I should not have said a word on this subject, but for a remark which has just fallen from the gentleman from Massachusetts, reiterating a charge of inconsistency upon the Committee of Elections, of which I am a member—an imputation which, if to be made any where, should have been made, not against the committee generally, but against myself. The gentleman

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ed.

must recollect, as I have already stated in the course of this debate, by way of explanation, for the purpose of exculpating the committee from this charge, that he derived this idea of inconsistency from a conversation with me in the committee room, in which he might have conceived it to have been my opinion that the *quo animo*, or the feeling of the mind, was the pivot on which this question turns. He must, however, recollect that, subsequently, I gave it as my opinion that this principle was not applicable to his case, but rather to the political right of citizenship, or allegiance. But, sir, for the sake of argument, suppose that I should admit that this is the principle upon which the question rests, *cui bono*, what good would it do the gentleman? If he assumes the principle, he must follow it out, whithersoever it may lead; and if he does so, he becomes *felo de se*—he cuts his own throat. It is a bad rule that will not work both ways; and how is the feeling of the mind to be known? It can only be known by external circumstances; and, unfortunately for the gentleman, all these, and some of them most stubborn facts, are against him; the evidence is all against him. Sir, it only comes to this, that the gentleman may have had, at different times, a vague notion of returning to Massachusetts, but did not return; but that, on the other hand, he had much more constantly and effectually an intention of remaining, and did remain, a resident for six or seven years in the District of Columbia, prosecuting his own interests, at his own will; or, as gentlemen seem fond of technical phraseology, he had the *animus revertendi*, but unfortunately he had a much stronger *animus manendi*, which proved victorious, and kept him from returning, which, had he done, he would have avoided his present difficulty. But, sir, what has all this trumpery about the *quo animo*, the *animus revertendi vel manendi*, about Vattel and Puffendorff, and all that sort of thing, to do with this plain question of constitutional law and fact? Just about as much as we have with the man in the moon.

Gentlemen seem to have fallen into some strange hallucination on this subject. In maintaining their doctrine, they undertake to subvert a plain and imperative requisition of the fundamental statute of this land, by applying to it, constructively, the principles of the common law of nations. Suppose that, in some of the State courts, any lawyer, in a plain case of law and fact; a case where a statute applied explicitly to some crime; a case in which the evidence was completely made out, and the law and the fact in entire unison; what would be thought, in such a case, of any lawyer who should attempt to overthrow, by applying to it the principles of the British common law, from Blackstone, or by preaching a *politico-moral homily* from Paley and Beccaria? And yet it would be of a piece with what is now attempted.

Mr. Chairman, I have prescribed to myself a very plain and simple method of construing this instrument, which I hold in



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1st Session.Speech of Mr.  
Hall, continued.

my hand, the constitution of the United States: a method which, if pursued with a view solely to the truth, will generally be right. It is to take the plain vernacular meaning of the words in which any subject is couched, and endeavor, in their plain sense, to find what was the intention of its framers. Having, to the best of my judgment, done this, I adhere to that interpretation, without attempting to bend or twist it to answer, by a strained construction, any other purpose; which, were I to do, I should be guilty of treason against my understanding and my moral sense. I have applied this rule to that part of the constitution which says "that no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." From which, it appears to me that the framers of the constitution meant to exclude two orders of persons from the House of Representatives, as members; persons who are not citizens of the United States, and citizens who are habitual non-residents of the States in which they are elected. So that the constitution demands, in so many words, that, to be a Representative, it is not only necessary to be a citizen of the United States, but, in addition to this, a person, to become so, must live among those who are to become his constituents; evidently drawing a plain and marked line of distinction between citizenship and inhabitance. I do not believe that it ever entered into the contemplation of the framers of the constitution, that ministers and consuls, resident in foreign countries, or heads of departments, or their clerks, residing in this District, or any other persons, living in any of the Territories, the property of the United States, were proper persons for selection as members of this House. Ministers resident, by the very force of the term, and the nature of the office, includes the idea of inhabitance, *pro hac vice*. But a man may cease to be an inhabitant of one place or country, without having a fixed or permanent residence any where. A man leaving this country, and travelling thirty or forty years over Europe, Asia, and Africa, could hardly be said to be an inhabitant, all this time, of the United States. I should like to know by what sort of *hocus pocus*, ministers and consuls, residing habitually at foreign Courts and mercantile places, in foreign countries; or heads of departments and their clerks, residing for a series of years in the District of Columbia, surrounded by all the means and appliances of domestic enjoyment, having their wives and children, being housekeepers, in possession of wealth and all the comforts of life, can be, all this time, living in Georgia, or Massachusetts, or any other State in the Union.

Gentlemen fall into this error, by confounding the abstract political right of citizenship with the act of inhabitance



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 1st Session.

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 Hall, continu-  
 ed.

which the constitution requires; but, sir, I consider them doubly disqualified from becoming members of this House, by habitual residence out of the State for which they were or might be elected, (I know of no better definition of inhabitance than habitual residence. I would thank any gentleman for a better,) and office-holding under the United States, which, so long as they continue to do, is a disqualification in the face of that part of the constitution which requires that "no person holding any office under the United States shall be a member of either House during his continuance in office"—showing clearly an intention to keep distinct and immiscible the executive and legislative functions of the Government; and, sir, to return to the gentleman from Massachusetts, I feel no hesitation in saying that his seat ought to be vacated upon this ground, if he labored under no other disability. I know the decision in the case of Herrick and others has been quoted as bearing analogy to this part of the case under consideration, but I never take, as a precedent to follow, that which I believe is not founded in truth and principle. I think that decision was wrong, and was so decided only because a number of persons voted in a case that tried their own, which, had they been prevented from doing, as they ought to have been, the decision would have been against them. What are the facts in the case now before us? Why, that the election took place on the 8th of September, 1828, at which time he held an office under the United States, though the Congress for which he was elected, commenced the 4th of March previous, and he still held the office until the 28d of October thereafter. Sir, I had always thought that the people made members of the House of Representatives, taking care, however, to make them of such materials as were not obnoxious to the constitution, which is specific in prescribing the qualifications. But, according to the decision in the case of Herrick and others, and agreeably to the opinion of some, perhaps, in this case, it may be considered that the Speaker makes them by the administration of the oath to support the constitution, or, perhaps, that the Governor of a State may do it by his certificate, which, however, is only a kind of pass, the evidence of his election, to be presented to this House. But I am still of opinion that the people make members of Congress, at least for this branch, but they must do it agreeably to law, otherwise the act is void.

I will forbear to remark on the report of the Committee of Elections, in the case of the gentleman from Georgia, as it is not now a subject of discussion, (and is one which has been hooked to this, I will not say with what propriety,) further than to say that I do not entirely concur with the committee in that report.

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18th CONGRESS,  
1st Session.

## CASE LII.

JOHN FORSYTH, of Georgia.

[A citizen of the United States, residing as a public minister at a foreign Court, does not lose his character of inhabitant of that State of which he is a citizen, so as to be disqualified for election to Congress.

There was no direct vote of the House on this case.]

FEBRUARY 24, 1824.

Mr. BAILEY offered the following resolution, to wit :

“ *Resolved*, That the Committee of Elections, to which Resolution directing inquiry. were referred several papers respecting the right of the member returned from Norfolk district, in Massachusetts, to his seat in this House, be instructed to report whether any other members returned to this House were not, at the time of their election, inhabitants of the States from which they were respectively returned, with the facts of the cases, and their opinion thereon; and that the committee have power to send for persons and papers.”

Mr. BAILEY supported his resolution, and objected to the principle that the mere living in a place constituted *inhabitation*, in the sense of the constitution; and showed that, if admitted, it would apply to foreign ministers, and would exclude sitting members of this House.

Mr. SLOAN replied to Mr. BAILEY, and opposed the propriety of the resolution, inasmuch as the House was already in possession of sufficient information on the subject. The resolution, however, was adopted, and on the 3d of March, the committee made the following report :

That, in compliance with the instructions contained in the resolution of the House of the 25th of February, they have obtained from the Department of State certain documents in relation to John Forsyth, one of the members returned from the State of Georgia, which they ask leave to make a part of this report. From these documents, it appears that Mr. Forsyth was elected a member of the present Congress, during the time of his residence near the Court of Spain, in the character of minister plenipotentiary from the United States. The committee are of opinion that there is nothing in Mr. Forsyth's case which disqualifies him from holding a seat in this House. The capacity in which he acted, excludes the idea that, by the performance of his duty abroad, he ceased to be an inhabitant of the United States; and, if so, inasmuch as he had no *inhabitation* in any other part of the Union than Georgia, he must be considered as in

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the same situation as before the acceptance of the appointment. The committee respectfully ask leave to be discharged from the further consideration of the subject referred to them.

COMMITTEE OF ELECTIONS,  
February 26, 1824.

SIR: If there are any documents or evidences in the department over which you preside, that will enable the committee to comply with the duty imposed by the enclosed resolution of the House of Representatives, I have to request that you will communicate the facts to the committee.

I am, sir, very respectfully,

Your obedient servant,

J. SLOAN.

Hon. JOHN Q. ADAMS, *Secretary of State.*

DEPARTMENT OF STATE,  
Washington, 1st March, 1824.

SIR: I had the honor of receiving, on Saturday, the 28th ultimo, your letter, dated on the 26th, enclosing a resolution of the House of Representatives of the preceding day, and a printed list of members of the House in the present Congress.

The only person whose name appears on that list, and to whom the request in your letter is understood to apply, is Mr. John Forsyth, returned as a member of the House from the State of Georgia, and who, at the time when he was elected, was absent from that State, residing as a public minister of the United States at Madrid, in Spain.

I have the honor of enclosing, herewith, extracts from the communications of Mr. Forsyth to this department, containing evidence of those facts. Mr. Forsyth was appointed minister plenipotentiary to Spain, in February, 1819, and returned to the United States last June. The time when he was elected to the present Congress does not appear from any official documents in this department, but is known to have been while he was in Spain.

I am, with great respect,

Sir, your very humble and obedient servant,

JOHN QUINCY ADAMS.

JOHN SLOAN, Esq.

*Chairman of the Committee of Elections  
of the House of Representatives U. S.*

*Extract of a letter from Mr. Forsyth to the Secretary of State,  
dated Madrid, May 20, 1822.*

“By late letters from Georgia, I find that my name is put on the list of candidates for the next Congress. This has been done in virtue of a discretion given to my friends. I

request that you would communicate to the President that, if elected, to qualify myself for a seat in Congress, according to my mode of construing the constitution, I shall be compelled to relinquish my post here before the 4th of March next; and, if not elected, it will be necessary for me to return to America during the ensuing summer, to attend to my private business."

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*Extracts of a letter from Mr. Forsyth to the Secretary of State, dated Madrid, March 3, 1823.*

"My note, asking an interview, to take leave of this Court, was answered on the first, and I had an audience yesterday of the King, who was in bed."

"I shall leave Madrid as soon as my passports are sent to me."

*Extract of a letter from Mr. Forsyth to his Excellency Don Evaristo San Miguel, Secretary of the Despatch of State, dated Madrid, February 25, 1823.*

"The undersigned, minister plenipotentiary of the United States of North America, having been elected a member of the House of Representatives of the United States, by the people of the State of Georgia, is obliged, by the constitution of his country; to leave the situation he now holds near the person of his Catholic Majesty, before the 4th of March next. The Government of the United States is apprised of the intention of the undersigned to return to his country to perform the duties of the trust confided to him by his fellow-citizens. No doubt there is now on the way to Madrid the instructions of the President on this subject. With the hope of receiving them before his departure, and from his due anxiety to prove, in the present situation of the Spains, the interest taken by his Government in their welfare, the undersigned has delayed until now to take leave of his Catholic Majesty. It can, however, be no longer delayed. The undersigned asks, therefore, his Excellency the Secretary of State's Despatch, to learn from his Majesty at what time prior to the 4th of March the undersigned can have an audience to take leave."

[TRANSLATION.]

*Don Evaristo San Miguel to Mr. Forsyth.*

MADRID, March 1, 1823.

SIR: I have informed his Majesty of the note which you addressed to me under date of the 25th of the preceding month, and his Majesty has been pleased to appoint the hour of twelve in the morning of the second, to receive you to your audience of taking leave.

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Elections.

I renew to you the assurances of my most distinguished consideration, and pray God to preserve you many years.

Your most obedient, humble servant,

EVARISTO SAN MIGUEL.

This report was committed to the same Committee of the Whole to which Mr. John Bailey's case was committed, and, on the 18th of March, after the decision of the House on Mr. Bailey's case,

*Ordered*, That the Committee of the Whole House to which is committed the report of the Committee of Elections, made in obedience to a resolution of the 25th of February ultimo, respecting the residence of members of this House, at the time of their election as such, be discharged from the consideration thereof, and that it be laid on the table.

There was no further action in the House on this case; but the discharge of the committee, agreeably to their own request, must be taken as a sanction of the opinions expressed by them in favor of Mr. Forsyth, inasmuch as he was allowed to retain his seat.

# NINETEENTH CONGRESS—FIRST SESSION.

## COMMITTEE OF ELECTIONS.

Mr. SLOAN,  
HAYDEN,  
TUCKER, of S. C.  
PHELPS,

Mr. HOFFMAN,  
POWELL,  
BRYAN.

### CASE LIII.

DANIEL HUGUNIN *vs.* EGBERT TEN EYCK, *of New York.*

[A misnomer, occasioned by the mistakes of the returning officers, whereby a candidate loses the benefit of votes fairly given to him, may be corrected, upon the proper evidence being exhibited.]

DECEMBER 9, 1825.

Petition presented, and referred to the Committee of Elections.

On the 15th of December, 1825, the Committee of Elections reported: That the petitioner states, that at the last election for Representatives to the Congress of the United States, in the State of New York, he was a candidate in the twentieth district of said State, and that he considers himself entitled to a seat in this House; but that, owing to the mistakes of the returning officers of some of the towns, Egbert Ten Eyck has been improperly returned in place of the petitioner.

Report of the  
Committee of  
Elections.

By the constitution and laws of New York, all elections are by ballot, and a plurality decides. The elections are held in the several towns, and are under the superintendence of five inspectors, consisting of the town clerk, the supervisor, and three assessors, or a majority of them, who call to their assistance two persons, who officiate as clerks of the election. Two certificates of the result of the election are to be made out and signed by the said inspectors; one of which is to be entered of record in the office of town clerk, and the other in the office of the clerk of the county. After making these certificates, the poll lists and ballots are destroyed.

Election law of  
New York.

The twentieth congressional district of New York is composed of the counties of Oswego, Jefferson, Lewis, and St. Lawrence, and is entitled to elect two Representatives. The election in said State for Representatives to the present Congress, was held on the first Monday of November, 1824, and the two succeeding days. At that election, it appears that Daniel Hugunin, junior, Nicol Fosdick, Egbert Ten Eyck, and Horace Allen, were candidates. The official certificate of the State canvassers presents the following state of votes:

District, how  
composed.



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Committee of  
Elections.  
Statement  
votes.

For Daniel Hugunin, jun., . . . . . 5,188 votes.

For Nicol Fosdick, . . . . . 5,676

For Egbert Ten Eyck, . . . . . 5,484

For Horace Allen, . . . . . 5,472

It further appears, by the said certificate of the State canvassers, that in the said twentieth district the following were returned, among others, as *scattering* votes.

From the county of Jefferson, for Daniel Hu-

gunin, junior, . . . . . 275 votes.

From the county of Lewis, for Daniel Hugunin, 53

From the county of St. Lawrence, for Daniel

Hugunin, . . . . . 142

To establish the right of the petitioner to the seat in this House, to which Egbert Ten Eyck has been returned by the proper authorities of the State of New York, he has presented sundry affidavits, taken before competent authority, and after due notice to the sitting member of the points relied on, and the time and place of taking the testimony.

Testimony in  
the case.

Stephen Gifford and Seth Peck, of the town of Watertown, in the county of Jefferson, depose that they were legally members of the board of inspectors for said election, and that they acted as such at the late congressional election, and that at said election Daniel Hugunin, jun. received 271 votes for member of Congress. But that in making out the certificate of the result of said election, it was omitted unintentionally, and by mistake, to insert, after the name of Daniel Hugunin, the word *junior*, as they ought to have done, and that, in consequence of said omission, the said 271 votes were lost to the said Daniel Hugunin, jun.

Stephen Smith, Daniel Stone, and Joseph Freeman, depose that they were legally members of the board of inspectors for the town of Madrid, in the county of St. Lawrence, and that they officiated as such at the late congressional election in said town; and at said election Daniel Hugunin, jun., for member of Congress, had ninety-three votes, but that, through an unintentional mistake, it was omitted to insert, after the name of Daniel Hugunin, the word *junior*; and that, in consequence thereof, the said ninety-three votes were lost to the said Daniel Hugunin, jun.

Evidence.

Samuel B. Anderson deposes that he was legally a member of the board of inspectors for the town of Louisville, in the county of St. Lawrence, and that he acted as such at the late congressional election in said town, and that at the said election Daniel Hugunin, jun. had forty-eight votes for member of Congress; but, by a mistake in omitting to insert the word *junior* after the name of Daniel Hugunin, the said forty-eight votes were lost to the said Daniel Hugunin, jun.

Opinion  
committee.

The present case being similar to several other cases decided by the House, it is deemed unnecessary to enter into any argument in support of the conclusion to which the committee has arrived, the decisions being uniform.

The testimony produced by the petitioner clearly establishes the fact of his having received more votes than were allowed to him in the estimate made by the State canvassers, and that there ought to be added to his poll, as certified by the said canvassers, the votes given for him in Watertown, in Jefferson county, and those given for him in the towns of Madrid and Louisville, in the county of St. Lawrence, which, when allowed, will produce the following result, viz.

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Elections.

*For Daniel Hugunin, jun.*

Votes certified by State canvassers, . . . . .	5,188
Votes at Watertown, Jefferson county, . . . . .	271
Votes at Madrid, St. Lawrence county, . . . . .	93
Votes at Louisville, St. Lawrence county, . . . . .	48

Total for Daniel Hugunin, jun. . . . .	5,600
For Egbert Ten Eyck, as certified, . . . . .	5,484

Majority for Daniel Hugunin, jun. . . . .	116
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Daniel Hugunin, jun. having, as appears from the facts in the case, received 116 votes more than were given for Egbert Ten Eyck, is therefore entitled to a seat in this House.

The committee submit the following resolutions:

“Resolved, That Egbert Ten Eyck is not entitled to a seat in this House.

“Resolved, That Daniel Hugunin, jun. is entitled to a seat in this House.”

These resolutions passed without opposition, and the petitioner was admitted to his seat.

Petitioner entitled to his seat, and admitted.

1836.  
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1st Session,

## CASE LIV.

JOHN BIDDLE AND GABRIEL RICHARD vs. AUSTIN E. WING,  
*Delegate from Michigan Territory.*

[It is not the province of the Committee of Elections to inquire whether voters have been prevented by intimidation from giving their votes to a particular candidate, nor can they inquire into the exercise of that discretionary power which judges of an election have, of receiving or rejecting votes, unless corruption should appear, sufficient to destroy all confidence in the purity and fairness of the whole proceeding.

One who produces *ex parte* testimony, is precluded from objecting to the admissibility of testimony taken in the same manner with that which was procured in his favor.

Whether the votes of the Indian, or "half breed," population, possessed of the other requisite qualifications, are to be received, must depend upon their manner of living, places of abode, and their nearer or more remote assimilation to the great body of the civilized community.

Officers and soldiers of the army, being long quartered in a territory, do not, by that means, acquire the right to vote at an election.

The votes of aliens, non-residents, and mere sojourners, are to be rejected.

An assessment, chargeable in days' work upon the public highway, is not a *tax*, within the legal and appropriate meaning of that word.

The officers of the different election districts must certify the result to the canvassers, and *they* must certify to the Governor. They are all ministerial officers, and error committed by any of them, either through mistake or design, is to be corrected by the House.]

JANUARY 18, 1836.

Mr. SLOAN, from the Committee of Elections, made the following report :

Report of the  
Committee of  
Elections.

The Committee of Elections, to which was referred the several memorials and documents in relation to the contested election of Delegate from the Territory of Michigan, report, that they have had the subject under consideration, and submit the following resolutions :

" *Resolved*, That the territorial canvassers of Michigan exceeded their powers in canvassing the votes for a Delegate for said Territory ; but that their decision, in reference to the result of said election, affected only the right of the supposed elected Delegate to the *certificate for the seat*, and not the seat itself.

" *Resolved*, That the consideration of this case be postponed, and that two months be allowed the parties to procure testimony, and that they be required to give notice to each other of the times and places of taking testimony, specifying the points on which they respectively rely ; and that suffi-

cient time be allowed for all the parties to be present at the taking of such testimony."

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1st Session.

JANUARY 23.

*Ordered*, That the foregoing report be recommitted to the Committee of Elections.

FEBRUARY 13.

Mr. SLOAN, from the Committee of Elections, to which had been referred sundry documents in relation to the late election, held in the Territory of Michigan, for a Delegate to represent the said Territory in the nineteenth Congress of the United States, made the following report:

The Committee of Elections, to which was referred the subject of the contested election of Delegate from the Territory of Michigan, have again had the subject under consideration, and report:

The right of the Territory of Michigan to elect a Delegate to Congress is derived from the laws of the United States. The second section of the act, passed the 16th day of February, 1819, provides "that every free white male citizen of said Territory, above the age of twenty-one years, who shall have resided therein one year next preceding the election, and who shall have paid a county or territorial tax, shall be entitled to vote at such election for a Delegate to the Congress of the United States, in such manner and at such times and places as shall be prescribed by the Governor and judges of the said Territory." By the laws of said Territory, the elections are directed to be by ballot, and are to be holden at the seats of justice of the several counties, under the superintendence of the judges of the court, the county commissioners and sheriff, or a majority of them, who are to be inspectors of election in their respective counties. And it is further provided, that when any county may contain two or more election districts, the electors who may assemble at any election other than that holden at the seat of justice, shall, under the superintendence of a justice of the peace, elect four persons as inspectors of election, who shall take an oath to perform the duties of their appointment. The inspectors are required to canvass the votes given, and make a return of their proceedings to the Secretary of the Territory, who, together with the Attorney General and Treasurer, shall constitute a board of territorial canvassers, and shall, on or before the fourth Thursday in October next after the election, proceed to ascertain the aggregate of votes given for each person, and shall determine the person who is duly elected, and shall make and subscribe a certificate of such determination; which shall be recorded in the office of the Secretary, and a transcript thereof shall be delivered to the Governor of the Ter-

Second report  
of the Committee  
of Elections  
on the merits of  
the case.

Statement of  
facts.

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Report of the  
Committee of  
Elections.

Nothing but  
necessity ought  
to be permitted  
to vacate an  
election fairly  
made.

Ground of Mr.  
Richard's claim

ritory ; and the Governor is by the laws of the United States required to give to the person duly qualified according to law, and who shall receive the greatest number of votes, a certificate, which shall entitle him to take a seat in the House of Representatives, in the capacity of Delegate from the Territory of Michigan. The election for a Delegate to the present Congress was held on the 31st of May, 1825. At that election Austin E. Wing, John Biddle, and Gabriel Richard, were candidates, and each contends for the seat of Delegate from the said Territory, and a vast mass of testimony has been presented in support of their respective claims, much of which, being of an irrelevant character, will not be particularly noticed in the view of the subject which the committee have here presented. In all cases of contested elections, where the question depends upon matters of fact which are controverted by the parties, much difficulty is to be expected in coming to a decision ; and, where there is room for doubts, a disposition is often felt to return it to the people. This, however, ought not to be done, when it is possible to ascertain what the true result has been. The elective privilege is a very important one, and ought to be held in the highest estimation. When a people, in the exercise of their constitutional rights, have gone through with the process of an election, according to the prescribed rules, they ought not to be deprived of the advantages accruing therefrom, but for the most substantial reasons. No doubts, which are capable of being solved, ought to be permitted to operate against them. Indeed, nothing short of the impossibility of ascertaining for whom the majority of votes have been given, ought to vacate an election ; more especially, if, by such decision, the people must, on account of their distant and dispersed situation, necessarily be unrepresented for a long period of time. The committee being of opinion that in this case an election has been made, have proceeded to ascertain on whom the choice has fallen.

Mr. Richard rests his claim to the seat on grounds which, to the committee, appear entirely novel, and, as they do not at all interfere with any of the matters in controversy between the other candidates, will be first examined. He does not pretend that he has received the greatest number of votes that were actually given ; but that he would have received the greatest number of votes had not his friends, at the election, holden at the city of Detroit, been intimidated from voting, by reason of the interference of deputy sheriffs and constables, who, it is alleged, under the pretence of keeping the peace, struck several persons on the head, and by that means prevented them, and many others, from voting for Mr. Richard. The committee are of opinion that the duty assigned to them does not impose on them an examination of the causes which may have prevented any candidate from getting a sufficient number of votes to entitle him to the seat.

They consider that it is only required of them to ascertain who had the greatest number of legal votes actually given at the election. An election is the act of selecting, on the part of the electors, a person for an office of trust. The inspectors of election are constituted judges of the qualifications of the electors, and exercise, from necessity, a discretionary power; if they err, and reject a legal vote, or an elector, from any cause, should fail in presenting his vote for their reception, the nature of the case precludes it from entering into the consideration of the general result of the election; unless, indeed, corruption should appear, sufficient to destroy all confidence in the purity and fairness of the whole proceeding. It is properly a question between those officers and the injured party; and the laws of the Territory, in this case, make ample provision for guarding the purity of the election, and for the punishment of offences against the rights of the citizens in that respect. In case of the application of the contrary doctrine, the greatest uncertainty must necessarily prevail; and should it be established, it would be placing in the hands of a few riotous individuals the power of defeating any election whatever. The law appoints a particular time and place for the expression of the public voice; when that time is past, it is too late to inquire who did not vote, or the reasons why. The only question now to be determined, is, for whom the greatest number of the legal votes have been given. But, although, on general principles, the committee think that the claim of Mr. Richard ought to be rejected, they have thought it due to all the parties, and particularly to the citizens of Detroit, whose character is deeply implicated, to present a brief statement of facts, as they appear in evidence. The election in that city was very warmly contested; it was held in the council house, a room capable of holding two or three hundred persons: the electors were permitted to come into the room and give in their ballots, and to stay or retire at their pleasure. Under this state of things, it is very natural that much confusion should exist, to the great annoyance of the inspectors. By the laws of the Territory, sheriffs and constables are required to aid in preserving peace and good order; and, although the friends of Mr. Richard are those who alone complain, it is by no means certain that the attention of the officers was directed solely to them. Besides, the fact of Mr. Richard having received at that election nearly as many votes as were given for both of the other candidates, seems to forbid the idea that any thing like intimidation would have been resorted to by either of the weaker parties. The committee, on full consideration of every thing urged by Mr. Richard, have unanimously come to the conclusion that he is not entitled to the seat.

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Report of the  
Committee of  
Elections.

Opinion ad-  
verse to Mr.  
Richard.

Having come to this decision, the only question to be considered is as between Mr. Wing and Mr. Biddle. It would have been desirable, in the determination of this question,



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Elections.

Testimony ta-  
ken *ex parte*  
may be rebut-  
ted by similar  
testimony.

that the same unanimity should have prevailed in the committee, that did in regard to the case of Mr. Richard: such is not the fact. It is proper, however, to state that the difference of opinion relates more to the manner of taking the testimony, than to any facts which that testimony discloses. It appears that the Secretary and Treasurer of the Territory of Michigan met as territorial canvassers, for the purpose of examining and counting the votes given for a Delegate to Congress, on the 5th day of August, 1825; at which time opposition was made, by counsel, in behalf of Mr. Wing, to the legality of certain votes given at the said election, and particularly to those given at the Sault de St. Marie, on the ground that they were "contaminated by fraud and corruption," and affidavits were offered to the canvassers to sustain the allegation. This mode of proceeding was objected to by the friends of Mr. Biddle, and the case was argued on both sides for several days, when the board decided in favor of hearing testimony; and at the request of the friends of Mr. Biddle, the board adjourned, to give time for them to procure rebutting testimony. On the 21st of October, after having received and examined all the testimony which all the parties thought proper to offer, the board decided that Mr. Wing was duly elected, and gave a certificate accordingly. These proceedings are stated to elucidate the circumstances under which the testimony was taken, and to show that, in the taking of testimony, both parties pursued the same course. Nearly all the testimony has been taken *ex parte*. The committee are aware that, in most cases in courts of justice, testimony of that kind is not admissible; but they are of opinion that, in this case, no well founded objections can be made on the part of Mr. Biddle. By procuring and presenting testimony in the same manner that Mr. Wing did, and soliciting, by his friends or counsel, an adjournment for that purpose, he must be considered as joining issue, and, therefore, precluded from objecting to the admissibility of testimony taken in the same manner with that which was procured in his favor. Doubtless, all the testimony that both parties could procure was presented, and the only question to be decided, in relation to it, is, as it regards its weight and credibility. Although, in relation to *ex parte* testimony, there will exist a disposition to view it with an eye of suspicion, yet, when it is examined with testimony of the same kind, taken for the express purpose of rebutting it, so far as the former is not contradicted by the latter, or in cases where both agree, all room for suspicion seems conclusively to be removed. Certified copies of public records, it is believed, are always considered good evidence. The reception of other evidence than that exhibited on the face of the returns of the election, is rendered necessary by the fact that many of the returns of the elections which were held in those districts, which did not embrace the seats of justice,

and under the superintendence of persons chosen for that special purpose, contained no proper authentication of their genuineness, or of the appointment or legal qualification of those who subscribed to them as inspectors. By the returns of the election, as made by the inspectors of the election, in the several districts, the following result appears :

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	AUG. E. WING.		JOHN BIDDLE.		GA. RICHARD.		Statement of the poll as returned by the inspectors.
	Votes allowed by inspectors of election.	Votes rejected by inspectors of election.	Votes allowed by inspectors of election.	Votes rejected by inspectors of election.	Votes allowed by inspectors of election.	Votes rejected by inspectors of election.	
Port Lawrence . . . . .	17	—	—	—	8		
Tecumseh . . . . .	14	—	—	—			
Monroe C. H. . . . .	94	4	13	—	261	8	
Washtenaw . . . . .	40	—	30	—	3		
Maguaga . . . . .	52	—	22	—	16		
Detroit . . . . .	202	2	145	1	268	2	
Oakland . . . . .	152	1	173	—			
Hoxie's settlement . . . . .	28	—	45	—	7		
Mount Clemons . . . . .	17	—	29	—	78		
Cottrellville . . . . .	13	1	5	—	44	2	
St. Clair . . . . .	24	—	30	—	28		
Sault de St. Marie . . . . .	3	—	58	—			
Michilimackinac . . . . .	19	—	42	—	2		
Brown county . . . . .	31	—	82	—			
Crawford county . . . . .	18	—	57	—			
	724	8	731	—	710	12	
	4	—	1	1	12		
	728	—	732	—	722		

From this statement, it will appear, by the returns of the inspectors, that of the votes allowed and counted by them, Same as corrected by the committee.

John Biddle had . . . . . 731

Austin E. Wing had . . . . . 724

And Gabriel Richard had . . . . . 710

And it will also further appear, that of the votes rejected by them,

John Biddle had . . . . . 1

Austin E. Wing had . . . . . 8

And that Gabriel Richard had . . . . . 12

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Report of the  
Committee of  
Elections.

From a careful examination of the testimony in this part of the case, the committee are of opinion that the votes for Mr. Biddle and Mr. Richard, which were rejected by the inspectors, ought to be added to their polls ; and that of the eight votes for Mr. Wing, which were rejected, four ought to be added to his poll. They will then stand as follows :

For John Biddle . . . . .	732 votes.
For Austin E. Wing . . . . .	728
For Gabriel Richard . . . . .	722

By this statement it appears that Mr. Biddle had four more votes than Mr. Wing, and ten more than Mr. Richard. Having made this examination and estimate from the returns, the committee proceeded to consider how far the fairness of the election and returns had been impeached by the testimony referred to them. On the part of Mr. Wing, it has been alleged that, at the Sault de St. Marie, a very large number of the persons who voted at the said election were disqualified from voting, for the following reasons, viz.

Certain classes  
of voters ex-  
cepted to by  
the sitting  
member.

1st. That a certain portion of them were Indians, of the half breed, and not free white citizens of said Territory, as required by the law of the United States.

2d. That a certain other portion of them were soldiers discharged from the army of the United States, within one year next preceding the election.

3d. That a certain other portion of them were aliens, and not citizens of the Territory.

4th. That part of them were non-residents, one of whom was a paymaster of the army.

5th. That the whole, with the exception of ten, were disqualified, from not having paid a territorial or county tax.

To establish most of the facts here set forth, testimony of a very particular and positive kind has been adduced. In regard to the first class, there is some contradiction in the testimony ; so much so, that the committee have thought proper to waive the consideration of that part of the subject for the present.

Respecting the second class, there is presented a certificate of the sergeant major at the post of St. Marie, containing the names of the discharged soldiers, and the places of their nativity, together with the time of their discharge ; which is corroborated by the deposition of a sergeant, with the additional fact that these same persons voted at the election.

Evidence ex-  
hibited as to  
the legality of  
the votes.

Also depositions stating that the persons who constitute the third and fourth classes, particularizing them by name, voted at the election, and that they were non-residents and aliens, not entitled to vote.

In reference to the fifth class, which comprehends the whole of the above, and many more, the following testimony has been submitted :

1st. A certified copy of the original poll list, containing the names of all the persons who voted at the said election.

2d. A certificate of the clerk of the commissioners of the county of Michilimackinac, containing the names of all the persons who have been assessed for county taxes in said district of St. Marie, from the year 1823 to 1825, inclusive.

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3d. A certificate from the territorial treasurer, containing the names of all the persons in said district, who were charged with territorial tax for the same period. By all which it appears that, of the sixty-one persons who voted at said election, not more than ten had paid, within that time, any tax whatever.

On the part of Mr. Biddle, much testimony has been presented, as well for the purpose of rebutting these charges, as for establishing the fact that the same disregard to the requisitions of the law had prevailed at other districts. But so far as it respects the election at the Sault de St. Marie, with the exception of some depositions as to the civilized character of the half breed Indians, nothing appears to disprove the facts alleged by Mr. Wing, and sustained by the evidence which he has submitted. In relation to the alleged reception of illegal votes at other districts, particularly at Detroit, which appear to be presented with no other view than as a set-off against that of the Sault de St. Marie, the charge is of so indefinite a nature, and supported by testimony so vague and general in its character, as to render investigation impossible. The discrepancy, which is shown to exist between the poll list for the county of Wayne, and the list of persons assessed for county and territorial taxes, establishes little or nothing in the case. It will be observed that this tax list embraces only the year 1825, and can, therefore, afford no evidence that many who might not have been assessed for that year, may have paid taxes in former years. Besides, Detroit being the metropolis and emporium of the Territory, and citizens from all parts who happened to be then present, being, by the law, permitted to vote there, the number of votes must almost necessarily exceed the number of taxables for any single year. The committee, are, therefore, of opinion that the decision of the case must rest upon the character given to the election at the Sault de St. Marie. Although, in relation to some of the classes of persons who voted at that election, it might not be absolutely necessary for the committee to come to any positive decision, yet, as the question enters deeply into the views of all the contending parties, and excites a very great interest in the Territory, they have thought it proper to express their opinions concerning each separately. With respect to the first class, the committee are sensible that it presents a question very delicate and important; in deciding on it, they would be governed by two facts—the mode of life, and the society to which the party, by his own voluntary act, attaches himself. If, by his manner of living, and place of abode, he was assimilated to, and associated with, the great

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Quere whether  
Indians are en-  
titled to vote.

body of the civilized community ; had never belonged to any tribe of Indians, as a member of their community, and being possessed of the other necessary qualifications, no good reason is perceived against such a person being considered as a qualified elector. But, on the other hand, if he belongs to any of the tribes of Indians, or being an outcast, uncivilized in his deportment, and not approaching the manners of other citizens, it would be a prostitution of the character of an American citizen to attempt to clothe such a person with it. Of this class of persons ten are proved to have voted ; but, as there is a contradiction in their testimony, the committee have concluded not to take them into the estimate in the character in which they are, under this head, objected to.

Or soldiers of  
the army.

The second class, to which objections are made, consists of soldiers of the army discharged from service within one year next preceding the election. The committee consider it entirely unnecessary to enter into an argument to prove that officers and soldiers of the army, by being long quartered in the Territory, do not, by that means, acquire the right to vote at an election, whilst they remain in the service, nor do they consider it any more necessary to attempt to prove that, after being discharged, they must acquire the rights of electors in the same way that other persons would, who had not been thus in service. Of this description, twelve are proved to have voted at the election.

The third class to be considered, is that of aliens, persons who, being born in a foreign country, and owing allegiance to another Government, and who, therefore, could not claim to be citizens of the Territory, of course were not legal electors. Of this class, three are proved to have voted.

The fourth class is composed of non-residents, persons who had only recently taken up their abode in the Territory for a time, or were travellers or sojourners therein. Of this class three are proved to have voted.

The fifth class includes all the others before mentioned, and many more, amounting, in all, to fifty-one persons, who, it is alleged, were not legal electors, because they had not paid a territorial or county tax. The testimony before referred to, on this part of the subject, is not refuted by any part of the rebutting evidence. The only defence set up against this charge is, that such as had not paid county or territorial taxes, had qualified themselves in that respect, by the performance of labor on the public highway, which, it is contended, is equivalent to the payment of a tax. The laws of the Territory provide for opening and repairing the public roads, by a requisition on the inhabitants for a certain number of days' work, to be performed under the superintendence of a person appointed for that purpose, after having been enrolled by that officer, and duly notified by him. Taxes, as mentioned in the law of the United States, must be construed

to mean money; indeed, the uses to which taxes are applied forbids any other construction of the term. Taxes are reckoned in dollars and cents; the making and repairing of public roads is charged in days' works. The performance of work cannot, therefore, be the payment of a tax. The idea of work on the highway being equivalent to a tax, was, no doubt, derived, by mistake, from the regulations in that respect which prevail in New York and Ohio. But it will be observed that, in each of those States, there is a special constitutional provision to that effect. It is in proof that there is no road at the Sault de St. Marie, regularly established as a public highway, and that there is no officer there whose duty it is to attend to such matters; that no legal requisition could be made on the inhabitants to perform labor, that none was made; but that a few days before the election, a pretty general voluntary contribution of labor was made, no doubt with the idea that such contribution would qualify all who performed labor in that way to vote at the election, and thereby conceding the fact that they had not paid any other description of taxes. Every thing which appears to have occurred there, immediately before and during the election, shows that a general determination prevailed that every person should vote, without any very scrupulous regard to the provisions of the law on the subject. In support of Mr. Biddle's claim to the seat, much stress is laid on the assumption, by the board of territorial canvassers, of the power to decide who was duly elected, by the exercise of a controlling and supervising authority over the returns made by the inspectors of the election. It seems to have been taken for granted that if the board of canvassers, in that respect, had exceeded their authority, Mr. Biddle must be confirmed in the seat, because he had the greatest number of votes actually given. This conclusion would be correct, provided there was no power competent to control the decision of the inspectors of the election; but, as it is the special province of the House to decide on the fairness and legality of the whole transaction, as well in regard to the conduct of the inspectors as of the canvassers, it may be found that the error committed by the canvassers consisted in assuming jurisdiction of the case, and not in the result to which they arrived. It is on the certificate of the Governor that a Delegate takes his seat in this House. To enable the Governor to grant a certificate, an election must be held. The officers of the election must certify the result in their several districts to the canvassers, who must certify to the Governor; they are all ministerial officers, and error committed by any of them, either through mistake or design, is to be corrected by the House; and the admission of error on either side does not disprove the existence of others, on the contrary side, of equal or even greater magnitude. The committee entertain no doubt but that the canvassers, in assuming the jurisdiction which they

1826.  
19th Congress,  
1st Session.

Assessments  
payable in  
work upon  
roads are not  
properly taxes.

Effect of the  
assumption of  
judicial power  
by the territo-  
rial canvassers.



1826.  
19th CONGRESS,  
1st Session.

Report of the  
Committee of  
Elections, con-  
tinued.

exercised in this case, exceeded the powers intended to be conferred on them by the law ; but, having taken jurisdiction, neither of the parties ought to be aided or prejudiced by that circumstance, more especially when the testimony is such as to warrant the decision which the canvassers made. No illegal assumption of power by one description of officers can justify the illegal conduct of another description ; and the decision now to be made, embracing the whole transaction, on its original and intrinsic merits, without reference to the decision of the canvassers, it is not perceived that their decision can at all affect the substantial merits of the case. In determining a question of a contested election, turning on the reception of illegal votes, when that election has been by ballot, much difficulty will readily be discovered to exist ; and that it is next to impossible to establish any general rule which can safely be applied to all cases and under all circumstances. Under this state of things, the question presents itself, whether, inasmuch as you cannot, in all cases, determine for whom illegal votes have been given, you will disregard them in cases where the proof is clear and conclusive. Presuming that such a principle would not be sustained by the House, the committee have applied their best exertions to ascertain what are the facts in this case. In the conduct at all the election districts, save that at the Sault de St. Marie, it appears that no good grounds are furnished for impeaching the fairness of the proceedings, they having been as impartial as, perhaps, under the circumstances, was possible. But the conduct at the Sault de St. Marie cannot be sanctioned, without holding out a positive inducement to disregard all the regulations for guarding the fairness and purity of elections. At that place an election was held, at which four persons, not qualified electors, presided as inspectors ; sixty-one votes were received, fifty-one of which must be considered illegal, by reason of the non-payment of taxes ; in addition to which, twelve of that number have been proved to be discharged soldiers, not citizens of that Territory ; three aliens, and three non-residents. Under such circumstances, it would seem that the only question would be, whether the whole election ought not to be set aside. But, feeling every disposition to sustain each legal voter in the full enjoyment of his privileges, the committee will present the most favorable view of that election which can fairly be taken, or of which the case is susceptible. By the statement already presented, it appears that John Biddle received, as returned by the inspectors of election . . . . . 732 votes.

Deduct of bad votes given at the Sault de St.

Marie, discharged soldiers . . . . .	12
Aliens . . . . .	3
Non-residents . . . . .	3—18

Leaving for John Biddle . . . . . 714 votes.

By the same returns, it appears that, after deducting the bad votes given at the different elections, to the number of four, Mr. Wing had 728 votes. <sup>1826.</sup> <sup>19th Congress, 1st Session.</sup>

Deduct the votes given for him at the Sault de St.

Marie, which may have been bad. 3

Leaving for Austin E. Wing 725 votes.

Being 11 votes more than ought to be counted for John Biddle.

The committee submit the following resolution :

“Resolved, That Austin E. Wing is entitled to a seat in this House, as a Delegate from the Territory of Michigan.” <sup>Opinion of the committee that Mr. Wing is entitled to his seat.</sup>

This report was referred to the Committee of the Whole House ; and, on the 20th March, the House resolved itself into a Committee of the Whole, and Mr. SAWYER reported progress, and leave to sit again was granted.

Nothing was ever done after that day, and Mr. Wing continued as Delegate.

1828.  
19th CONGRESS,  
1st Session.

## CASE LV.

SUNDRY CITIZENS vs. JOHN SERGEANT, of *Pennsylvania*.

[Where two candidates have an equal number of votes, and agree to waive their claims, for the purpose of permitting a new election, and such new election is held, neither will be allowed to resume their rights, whatever they were, and contend for a seat under the first election.]

DECEMBER 14, 1827.

Memorial presented, and referred to the Committee of Elections.

On the 14th of January, 1828, the Committee of Elections made the following report:

Report of the  
Committee of  
Elections.  
Statement  
of facts.

This case presents the following state of facts, viz. That an election was held in the second congressional district of Pennsylvania, on the 10th day of October, 1826, for a member to represent it in the twentieth Congress. After a canvass of the votes given, it appeared that John Sergeant and Henry Horn had the highest and an equal number of votes. This fact was officially reported to the proper officer of the State, by the returning officers of the election. It appearing by this report that the people had failed to make a choice, the Executive of Pennsylvania seems to have considered the case as a vacancy; but not to the extent sufficient to warrant him in directing another election, until both Mr. Sergeant and Mr. Horn informed him, in writing, that they relinquished all claims to the seat, in virtue of the election of 1826. In consequence of the receipt of these letters, the Governor of Pennsylvania did, on the 5th day of September, 1827, issue his proclamation, particularly referring to the circumstances of the case; and directing an election to be held to supply the vacancy, on the 9th day of October, 1827: at which election it appears that John Sergeant was duly elected. Official copies of these letters, and of the Governor's proclamation, are herewith reported. The memorialists, who contest Mr. Sergeant's right to a seat, allege that at the election of 1826, on counting the votes contained in the coroner's and other boxes, there was found a number of votes in favor of Henry Horn, over and above those given for John Sergeant, clearly (as they say) indicating the intention of a plurality of the electors to choose Henry Horn. This memorial was unaccompanied with any testimony whatever. The committee at their first meeting directed their chairman to notify the memorialists that on a certain day named they would take up the subject for consideration, and that any testimony they might wish to present would be duly considered. Several

Petitioner  
should be rea-  
dy with his  
proof.

letters have passed between the chairman of the committee and one of the memorialists, and sundry depositions have been forwarded ; all of which are *ex parte*, having been taken, for aught that appears, without any notice to the sitting member. These depositions the committee consider entirely insufficient to invalidate the rights of the sitting member. But they think it quite unnecessary to go into an investigation of the rights of the parties, under the first election, because, whatever those rights were, they have been voluntarily relinquished. They, therefore, beg leave to submit the following resolution :

**“ Resolved, That John Sergeant is entitled to a seat in this House.”**

This resolution was, without debate or division, concurred in by the House, and Mr. Sergeant was, of course, confirmed in his seat.

1828.  
19th CONGRESS,  
1st Session.

A candidate having waived his rights cannot resume them.

Sitting member confirmed in his seat.

## TWENTY-FIRST CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. ALSTON, of S. C.  
TUCKER,  
CLAIBORNE,

Mr. JOHNSON, of Ten.  
BREKMAN,  
COLMAN.

### CASE LVI.

SILAS WRIGHT, JUN. *vs.* GEORGE FISHER, *of New York.*

[The inspector's return may be amended by the addition of the word "junior" to the petitioner's name, which, through their mistake, had been omitted.]

On the 15th December, 1829, the petition of Silas Wright, jun. was received, complaining of the undue election and return of George Fisher, as a member for the twentieth congressional district of the State of New York, and praying that his seat may be awarded to him. The petition was referred to the Committee of Elections, who, on the 19th of January, 1830, made the following report:

Report of the  
Committee of  
Elections.

That it appears from an official certificate from the Secretary of State of the State of New York, that at an election held, pursuant to law, in November, 1828, in the said district, for members of the twenty-first Congress of the United States, George Fisher received 8,939 votes, and Silas Wright, jun. 8,932 votes. That, in the county of St. Lawrence, one of the counties comprised within the said district, at the same election, Silas Wright received 46 votes, and in the county of Jefferson, Silas Wright also received, at the same election, 5 votes. It also appears, from other documents submitted to the committee, that the inspectors of the election in the town of Edwards, in the county of St. Lawrence, in making their return to the board of county canvassers of the said county, made a mistake therein, and omitted to add the word "junior" to the name of Silas Wright, and that, in fact, the person voted for by the electors of that town was Silas Wright, jun. the petitioner, and that he actually received 42 votes in that town, which were not returned for him by the board of inspectors of the said town, nor allowed to him by the board of county or State canvassers.

That it also appears to your committee, on an examination of the documents aforesaid, that, in the town of Granby, in the county of Oswego, in the said congressional district, 81 votes were given by the electors of said town, at the said election, for Silas Wright, jun., and 76 votes were given for George Fisher. That the inspectors of election for the said town, in making their return to the board of county canvassers, of the result of the said election in that town, although

they returned the whole number of votes given for members of Congress, omitted to state the number of votes given for each candidate for that office; and the board of county canvassers were, therefore, unable to, and did not, take into their account, and did not make a return to the board of State canvassers, of the result of the election in the said town.

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21st Congress,  
1st Session.

Report of the  
Committee of  
Elections.

That it also appears, from the said documents, that Silas Wright, jun. received 49 votes in the town of Boyleston, in the county of Oswego, at the said election; and that the inspectors of election, in the said town, made a mistake in their return to the board of county canvassers, and did not return any votes given for the said Silas Wright, jun.; and, as the county canvassers were guided, in making up their return to the board of State canvassers, by the return of the town inspectors, these 49 votes were not taken into account in making up the final result of the said election.

Your committee are of opinion that, although there is some contradictory testimony as to the vote in the towns of Granby and Boyleston, the weight of evidence is decidedly in favor of the existence of the facts as detailed in this report: and they also think that the 42 votes returned from the town of Edwards for Silas Wright, the 81 votes given in the town of Granby for Silas Wright, jun., and the 49 votes given in the town of Boyleston for Silas Wright, jun. should be allowed to the petitioner; in which case, the result of the election in the said district for member of Congress would be, for George Fisher, 9,015; for Silas Wright, jun. 9,104; giving to the latter a majority of 89 votes over the former. Some other questions touching the said election are presented to the committee by the said documents; but as, in the opinion of the committee, they do not affect the general result, if your committee are right in their conclusion as to it, they deem it unnecessary to present them to the notice of the House.

Your committee, therefore, beg leave to introduce the following resolution:

**Resolved**, That Silas Wright, junior, is entitled to a seat in this House, as a member of Congress for the twentieth congressional district of the State of New York, in the place of George Fisher, the sitting member.”

Resolution that  
the petitioner  
is entitled  
his seat.

**Ordered**, That said report be committed to a Committee of the Whole House on Tuesday next.

On the 5th February, Committee of the Whole discharged, and the preceding resolution, submitted by the Committee of Elections, was agreed to by the House. On the 15th February, 1830, it was, on motion of Mr. HOFFMAN,

**Resolved**, That the Speaker of this House inform the Executive of New York that the seat in the present Congress, for the twentieth congressional district, occupied by George Fisher, has been, by a resolution of this House, awarded to Silas Wright, junior.

March 9, a letter was laid before the House by the Speaker, from the said Silas Wright, jun. resigning the seat.



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1st Session.

## CASE LVII.

GEORGE LOYALL vs. THOMAS NEWTON, of Virginia.

[Testimony taken in pursuance of regular and sufficient notice, before persons having authority, by the laws of the State, to administer oaths, is entitled to be read in the cause.

And it seems to be no objection to the testimony, that the persons taking it assumed to act under a commission from a court which obviously had no power to grant such a commission.

The land books are evidence, and the testimony of the voter himself may be received to prove his own vote, where the freehold has not been entered on the land books.

The mayor of Norfolk has the same power that the sheriffs of the counties have, in Virginia, of adjourning the polls, in the event of rain, &c., and was held, in this case, to have exercised it legally.]

FEBRUARY 19, 1830.

Mr. ALSTON, from the Committee of Elections, made the following report:

Report of the  
Committee of  
Elections.

The right of suffrage, in the several counties in the State of Virginia, is confined to citizens over the age of twenty-one years, and who are freeholders, possessed either by themselves, or tenants of at least twenty-five acres of land, with a house thereon, the superficial contents of the foundation whereof is twelve feet square, or equal to that quantity, and a plantation thereon; or fifty acres of unimproved land; or a lot, or part of a lot, in a city or town established by law, with a house thereon of similar dimensions, and having been in possession of the same six months before the election; unless when he derives title by descent, devise, marriage, or marriage settlement, as will be seen by a reference to the constitution of Virginia, article —, section —, and to the revised statutes of Virginia, chapter 51, section 3, and p. 155.

In the borough of Norfolk, the right of suffrage is given, by charter, in 1736, "to the mayor, &c., and to all the freeholders of said borough owning half a lot of land, with a house built thereon according to law; and to all persons actually residing and inhabiting in the said borough, having a visible estate of the value of fifty pounds, current money, at the least; and all persons who hereafter shall serve five years to any trade within the said borough, and shall, after the expiration of their time of service, be actually housekeepers and inhabitants in said borough." The right of suffrage in said borough of Norfolk is limited by the statute of Virginia, passed in the year 1818, chap. 51, sec. 6, p. 156, as follows: "The same qualification as will authorize him to

vote for a Delegate to represent the county ; and also every freeman aged twenty-one years, being a citizen, who shall be a housekeeper, and shall have resided six months in the said city or borough, and shall be possessed of a visible estate of the value of one hundred and sixty-six dollars and sixty-six cents at least, or shall actually have served as an apprentice to some trade within the said city or borough, for the term of five years, and shall have obtained a certificate of such service from the court or the notary, under the common seal of the city."

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1st Session.

Report of the  
committee, con-  
tinued.

The committee are of opinion that the right of the voters of the borough of Norfolk is in no way altered or changed by said statute ; but, in their examination of the testimony in relation to the votes of that place, have kept in view the distinction made as to the qualification of the voters in the borough between the statute and the charter, and are of opinion that, whether the one or the other be made the criterion as to the qualification of the voter, the result, as hereafter stated, will not be varied.

At the election holden for said district in April last, the petitioner and the said Thomas Newton were the only candidates in said district for a seat in the twenty-first Congress of the United States, and it appears, from the official returns made for said congressional district, that

Thomas Newton received . . . . .	948 votes.
And George Loyall received . . . . .	935

Majority for Newton . . . . .	13
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On examination, the committee find that there is no law prescribing the mode of taking testimony in contested elections for a seat in the Congress of the United States ; that the petitioner proceeded, according to the mode designated by the laws of Virginia for contesting the right to a seat in the House of Delegates in that commonwealth ; that he gave notice to the sitting member of his intention to contest the election, accompanied by a list of votes, amounting to the number of one hundred and eighty-four votes, and the names of the voters, and the objection to each one which he considered illegal, and within the time prescribed by the act ; that he had commissioners appointed, as directed by the act, to take the testimony of witnesses, and gave the sitting member notice of the time and place, and took his testimony within the time prescribed by law ; that said commissioners were men who were qualified to administer oaths by virtue of offices holden by them under the laws of Virginia previous to their appointment, and, at the time of taking said testimony, being notaries public or justices of the peace ; that the sitting member also furnished a list of voters to the petitioner, of 384, (three hundred and eighty-four,) to the legality of whose votes he objected, and the reasons of

Manner of tak-  
ing testimony  
by the petition-  
er.

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Report, continued.

Proofs taken  
agreeably to  
the laws of the  
State admissi-  
ble.

Votes taken on  
the adjourn-  
ment of the  
polls excepted  
to, but

Admitted as legal  
by the committee.

his objection, within the time prescribed by the said statute of Virginia. And so soon as the petitioner commenced taking his testimony, the sitting member protested against taking depositions before the commissioners, for the reasons assigned by him in the several protests by him made and filed; and, notwithstanding the protest, the petitioner proceeded and took his testimony within the time prescribed by the aforesaid act of the Legislature of Virginia. The sitting member then proceeded, and took his testimony before two justices of the peace, who were authorized to administer oaths, after having given the petitioner sufficient notice of the time and place, and that a large proportion of the testimony of the sitting member was taken in the absence of the petitioner, during the time of his attendance at Richmond as a member of the convention of Virginia. The committee are of opinion that the depositions on both sides having been taken by officers authorized to administer oaths under the laws of Virginia, and in pursuance of notice regularly given, ought to be admitted as testimony, and were received and used by them as such.

The committee received as evidence the land books of the county of Norfolk, they having been regularly certified by the clerk of the county to be correct. These books are made out annually, under the laws of Virginia, and are intended to contain a list of all the separate tracts of land in the county, and the owners' names; and, also, a list of the lots, and parts of lots, in the towns of each county, which are established by law. And at the same time they have admitted and considered all other testimony exhibited by either party, dispensing with the rule that the best evidence that the case admitted of should be produced; they have received the testimony of the voter himself, to prove his own vote, when the freehold had not been entered on the land books, and they have received the testimony of other persons than the voter, to prove a freehold estate in the voter, whether the same was claimed by purchase or devise.

It was also insisted, on the part of the sitting member, that the votes polled at the borough of Norfolk, on the second and third days of the election, being the number of ninety-three for Loyall, and fifty-nine for Newton; should be rejected by the committee, on the grounds that the mayor of the borough of Norfolk had no right, under the charter of the borough, and the laws of Virginia, to continue the election longer than one day; and that, if he had the power to adjourn, the exigency required by law did not exist, and that his return should have been made as the poll stood at the close of the election on the first day.\*

The majority of the committee do not sustain this objection, being of opinion that the mayor of the borough of Nor-

\* In regard to the contingencies which authorize the adjournment of the poll, see *Bassett vs. Bayley*, ante, p. 254.

folk has the right to adjourn over, when either of the contingencies happen that are specified in the act of 1818, ch. 51, sec. 15, and page 158 of the revised code of Virginia; and that one of the contingencies did happen, as appears by the testimony exhibited to them; and that it was the duty of the mayor of the borough of Norfolk to have adjourned the election over to the second and third day, under the aforesaid act of Assembly.

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21st Congress,  
1st Session.  
Report, continued.

The committee, in the examination of the testimony, acted upon the following rules, heretofore adopted by this House in the case of Porterfield and McCoy, in addition to those heretofore mentioned:

- 1st. "That all votes recorded on the poll lists should be good, unless impeached by evidence."
- 2d. "That all votes not given in the county where the freehold lies, be rejected."
- 3d. "That the votes of freeholders residing out of the district, but having competent freehold estates within the district, be held legal."

Rules adopted  
by the committee.

The committee, having carefully examined the testimony according to these principles, are of opinion that the said petitioner hath sustained his exceptions to ninety-three votes polled for Mr. Newton, and that they ought, therefore, to be deducted as illegal votes, from the whole number of votes returned for the sitting member. They are also of opinion that the said Thomas Newton hath sustained the exceptions taken by him to fifty votes returned for the petitioner, and that the same should be deducted from the vote of George Loyall, as illegal votes given him at said election. The poll, then, according to the opinion of the committee, would stand as follows:

For Thomas Newton,	855 votes.
For George Loyall,	885
Majority for George Loyall,	30

The committee are further of opinion that, if the said parties had been confined to the strict rules of law, in requiring of them the best evidence the nature of the case admitted, and by refusing to receive parol evidence as to the freehold qualification of the voters, the majority of George Loyall would have been greatly increased, and the vote would then have stood as follows:

Loyall's exceptions sustained,	113
Newton's exceptions sustained,	42
The vote would then be thus:	
For Newton,	835
For Loyall,	893
Majority for Loyall,	58

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So that the committee are of opinion that the said George Loyall is entitled to a seat in the twenty-first Congress of the United States, as prayed for in his petition; and they, therefore offer the following resolution:

Resolution that  
the petitioner  
is entitled to  
his seat.

“Resolved, That George Loyall is entitled to a seat in the twenty-first Congress of the United States, as the Representative from the district in Virginia composed of the counties of Norfolk, Nansemond, Elizabeth City, Princess Ann, and the borough of Norfolk.”

*Letter of the sitting member.*

To the Hon. WILLIS ALSTON,  
*Chairman of the Committee of Elections:*

Argument of  
the sitting  
member.

SIR: I submit, with great deference and respect, to the consideration of the committee, some preliminary points of importance; a right decision on which is of deep interest, as they have a direct bearing on the fundamental principles of this republican Government, and the future good administration of it. As an humble individual, my destiny is of little moment, be it what it may; but if, through me, great fundamental principles will be brought in jeopardy, as well as those that relate to and support the purity of the jurisprudence of the nation, in all its divisions and various departments, it becomes of some little interest, and will awaken considerations paramount to feelings either of indifference or those of political partiality or hostility. According as the development of them shall be wise and judicious, will the nation increase in strength and prosperity, the Government be made stable, and every citizen, whether in the walks of private life, or engaged in the management of public affairs, have, as he should, the constitution as his ægis, and the law as his sword.

Having made these prefatory remarks, I proceed to state such points as I deem worthy of consideration and reflection.

1st POINT. The first objection I urge is, that the mayor of the borough of Norfolk, in violation of law, continued the poll over.

This objection was made by me to the mayor, when the petitioner made an application to him for the continuance of the poll over, and likewise to the petitioner, in due form, as the document in possession of the committee will show, to which I beg leave to refer them. The paper annexed, marked A, is a copy of it.

It is incumbent on me now to make some remarks in addition to those contained in that document.

In the State of Virginia, many of the counties are large, and the citizens inhabiting them have to travel a great distance to their respective court-houses. The Legislature, considering this a great inconvenience to the citizens, often preventing them from exercising their right of suffrage, au-

thorized the sheriffs of counties, who are the superintendents, in their respective counties, of all elections, whether for the State Legislature or for Congress, whenever the weather should be bad, or the rise of watercourses so high as to prevent travelling, or the voters should be too numerous to be polled before the setting of the sun, to continue over, or keep the polls open, for such and no other causes whatever. This power is expressly given to, and exclusively entrusted to, the exercise of the sheriffs of counties. The election law, in granting this power, names the sheriffs as the sole depositaries of it. The mayors of boroughs are not noticed or mentioned, when it bestows this power on the sheriffs of counties, and for the best reasons; at the time of the passage of that law, but few towns enjoyed the right and privilege of electing a member to the Legislature, and such as possessed it were so small and thinly populated, and the conveniences such to those entitled to the right of suffrage, that a day was more than sufficient to poll all the legal voters, in any borough entitled to representation. The ministerial offices that the mayor of the borough of Norfolk exercises, are those of holding elections, and giving a certificate of election to the person elected; even the certificate he gives is prescribed by law, and the form of it is fixed, and distinct from that prescribed for the sheriffs of counties.

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Letter of the  
sitting mem-  
ber.

Prior to the last election, on the 27th of April, 1829, there is not a solitary instance of any mayor having ever ventured to exercise such a power; and even the present mayor, on or about two years prior to the last election, in April, 1829, in a warmly contested election between the petitioner, Mr. Loyall, and Mr. Steed, on an application made by Mr. Steed to continue the poll over to the succeeding day, refused to do so. On that occasion, at the setting of the sun, Mr. Loyall had not more than two or three votes as his majority over Mr. Steed. The latter gentleman, in consequence of some voters coming to the poll about that time, with an intention to vote for him, asked a continuance of the poll over to the ensuing day, but he asked in vain. The poll was closed by the mayor, and Mr. Loyall was proclaimed as the member elected for the borough. Yet the same mayor, when the contest was, at the last election, between me and Mr. Loyall, when I was ahead of the petitioner from forty-three to fifty votes, at the setting of the sun on Monday, the 27th of April last, being the first day of the election, did, on the application of the petitioner, continue the poll over for him. These facts are proved by the depositions of disinterested and impartial witnesses, and can be substantiated by many more, were it necessary, proved by men of character, who could be under no bias to justify any thing they had done.\* If such conduct does not savor strongly of partiality, no com-

\* See depositions of James Tucker, Jos. Cunningham, and others.



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Letter of the  
sitting mem-  
ber.

combination of circumstances whatever, that can occur, could sanction such an imputation.

In the contested election between Mr. Bassett, of Virginia, and Mr. Bayley, in the year 1814, the Committee of Elections, in considering that case, supported the objections of Mr. Bassett to the keeping of the poll open beyond the first day, by the sheriff of Accomac county, and set aside the votes which were polled the second and third days of the election. This is a remarkably strong case in support of my objections; as the county of Accomac is one of the largest in the State of Virginia, and can poll from eleven to twelve hundred freeholders. The circumstances must be strong indeed, and the existence of the causes such as the law specifies, to justify the sheriff, to whom the law exclusively confides this power, to continue the poll over. The House of Representatives sustained the report of the committee. Even if the mayor of the borough possessed the power that sheriffs of counties do, (and I deny that he does,) the facts and remarks stated and made by me in the paper annexed, marked A, will clearly show that not one of the causes which the law specifies, occurred to justify him in keeping the poll open beyond the first day's election.

2d Point. I object to the taking of depositions before the board of commissioners appointed at the instance of the petitioner, for the following reasons:

Exceptions by  
sitting member  
to evidence taken  
before a  
board of com-  
missioners ap-  
pointed, as he  
alleged, with-  
out authority  
of law.

There is no law of the State of Virginia, nor any act of Congress, that authorizes the appointment of such a board for taking depositions in a contested election for a seat in the House of Representatives of the United States. The State law makes provision only for the mode of taking depositions in a contested election for a seat in the Legislature of the State of Virginia, and the provisions of that law ensure the purity of the evidence so taken under its sanction, by all the means and penalties that human foresight and caution can possibly suggest. Against false swearing before a board of commissioners organized for taking depositions in contested elections in the State Legislature, the penalties of perjury are denounced; but as that law does not empower any court to appoint commissioners to take depositions in a contested election for a seat in the House of Representatives of the United States, all its provisions and penalties will be unavailing to ensure the purity of evidence so taken. What confidence can be placed on evidence, when perjuries may be committed with impunity? If a man, before such a board, were notoriously to commit the grossest perjuries, he could not be punished were he indicted for the commission of them. An indictment against such a person would, on motion, be quashed by the court, because false swearing before such a board did not constitute perjury. The incompetency of such a board to take legal evidence was generally understood; its incompetency to do so was a subject of common

observation. The courts of Norfolk and Princess Ann counties refused an application, at the instance of the petitioner, to appoint a board of commissioners, on the ground that the law gave to them no power to appoint such a board for the purposes intended. If, in the prosecution of suits, in civil actions, however trifling some may be, the utmost regard is always had and observed by judicial tribunals, that decide on them; that the evidence given in support of them should be taken and rendered under all the vindictory sanctions of the law; if the law, to secure to the humblest citizen his liberty and his rights, is thus alive to his interest and happiness, how much more should the Legislature, the fountain of all law, maintain and guard the rights and privileges of its members, and those of the body politic, and not suffer them to be taken away or violated, but on solemn and grave investigation, before a competent tribunal, characterized and supported in every stage of its progress by the clearest legal evidence. Should a relaxation in the taking and reception of evidence ever be tolerated, in regard to contested elections in any Legislature, the great fundamental principles on which the Legislature itself is based, would be sapped, mined, and destroyed. The Legislature, in tolerating such a relaxation, would commit an act of suicide; the consequences would be appalling. The door for contested elections would be opened wide, and inducements held out to agitate legislative bodies with such contests. No man, who should be elected to a seat in any Legislature under such a state of things, could for a moment be secure in the possession of it.

On the 24th of June, 1829, the first notice was given to me, by the petitioner, that he should, by and through the agency of the commissioners appointed in his behalf, and at his instance, by the borough court of Norfolk, proceed to take, on the 26th of the same month, at the court-house of Norfolk county, in the town of Portsmouth, between the hours of 9 A. M. and 6 P. M. the depositions of Mordecai Cook and others. To this notice, on the 26th day of June, 1829, I returned the following answer:

“Before such a board of commissioners, for which I entertain all the respect that I ought to do, thus appointed in your behalf, I decline to appear, for the following objections, either in person or by any agent:

1. “Because it is a board, the creation of which is not authorized nor sanctioned by any law.

2. “Because none of the provisions of any law, authorizing the taking of depositions, and giving to them legal validity as evidence, when taken according to such provisions, refer to, or recognise, such a board of commissioners as has been appointed by the abovementioned court of hustings, for the purposes stated. I will always obey and respect, as a citizen, to the best of my knowledge, the law; but the duty which I owe to my country, and the regard I shall ever che-

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21st Congress,  
1st Session.

Letter of the  
sitting mem-  
ber.

Grounds of ex-  
ception by sit-  
ting member to  
board of com-  
missioners.

1820.  
 21st CONGRESS,  
 1st Session.  
 Letter of the sitting mem-ber.

risk for her and my rights, as a public man, or as an humble citizen, forbid me, by any act of mine, to give sanction to any order the court, in making of which, passes, over the jurisdictional line that the law prescribes to the exercise of its authority."

A copy of the original note was delivered to the petitioner on the 26th of June, 1829, and certified to have been so, by L. I. Fourniquet, on oath, made before D. C. Barraud; an alderman of the borough of Norfolk. Thus informed of my legal objections to the mode adopted by the petitioner, he had timely notice to proceed in taking his depositions as I have mine.

3d Point. If the committee will please to have reference to the list of votes on Mr. Loyall's poll, in the borough of Norfolk, to which I have objected, as illegally given to him, they will find, among the votes objected to, that thirty-two on the first day's poll are objected to on account of the voters not being citizens; and that fourteen votes given on the second and third day's poll to the petitioner are of the same character, to which the same objections apply. An alien, to become a citizen, must be naturalized according to law. The certificate of the clerk of the court in which he is naturalized, is the sole evidence or proof of his naturalization. This should be required to establish the citizenship of an alien. If this rule should not be observed, any alien may usurp and exercise rights which neither the constitution, nor the laws made in pursuance thereof, have bestowed. In all cases depending in our judicial tribunals, in which the question is citizenship, it is required to be proved by record evidence. How much more important it becomes to require strictly this proof, when a man, known to be an alien, claims, as a citizen, the right of suffrage. The population of the United States is rapidly increasing; in short periods of time it doubles itself. Some of our cities vie in grandeur, opulence, and commerce, with many in Europe. In them a relaxation of the rule laid down will be fraught with consequences that can be better conceived than expressed. Abuses of this kind have been complained of; and the mischiefs growing out of them have already been seriously felt. The power to naturalize aliens belongs exclusively to the Government of the United States. A State may confer on an alien the right to acquire and hold real estate; but an alien can, by no law of any State, become a citizen.

4th Point. The petitioner has objected to some votes polled for me in the county of Norfolk; on the ground that a freeholder of the borough, unless he holds lands in the county, is not entitled to vote in the county. Very few of the citizens of the borough voted for me in the county. It is a fact that the borough of Norfolk is in the county of Norfolk; the land on which it is built is in the county. Some of the citizens of the borough are often magistrates for the county.

Some of the county magistrates reside in the borough, perform their official duties there, and their jurisdiction is exercised in the borough in the same manner that it is in the county. The sheriff likewise exercises his powers, in like manner, in both places. The charter given to the borough was intended to enlarge the privileges of the citizens of the borough; not to take away rights possessed by them prior to the granting of it.

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ber.

The foregoing points are respectfully submitted to the consideration of the committee. Before closing this communication, I beg leave to remark that, in the depositions taken on my part, reference by the deponents was had to the land books, in giving their testimony. There are many freeholders who vote, and are entitled to do so, who have no land charged to them on the land books; but their qualifications to vote are either proved by themselves or others, who know they possess the necessary qualifications. Whenever the commissioner of the revenue could be had, he has been examined. I did not believe, from this manner of examining witnesses, with the land books before them, that the production of the land books would be necessary; but if the committee require their production, they shall be had, time being allowed for that purpose. If the land books are before the committee, one copy will answer in both cases as well as a thousand. I remain, with great respect,

Your obedient servant,

THOMAS NEWTON.

February 4, 1830.

A.

*Protest by the sitting member.*

To all and every vote polled on Tuesday, the 28th of April, and on Wednesday, the 29th of April, 1829, for you, at the court-house in the borough of Norfolk, I object to and protest against, because the mayor in and for the borough of Norfolk did not possess the power and authority, nor could the said mayor derive any such power or authority whatever, from any act or acts of Assembly, to authorize the said mayor to continue and keep open the polls beyond the 27th of April, 1829, the day appointed by law for holding an election in the said borough of Norfolk for choosing a member to represent this district in the Congress of the United States of America, composed of the counties of Nansemond, Princess Ann, Elizabeth City, Norfolk, and Norfolk borough. And even supposing the said mayor possessed or derived, by a fair construction, from any act or acts of Assembly relating to elections, the power or authority of continuing or keeping open the poll, which I do not admit, yet I contend that the said mayor did not rightfully, and according to the letter and spirit of such act or acts of Assembly, exercise such power or authority within the limitations prescribed by such act or

Sitting member  
protests against  
the votes given  
the 2d and 3d  
days of the  
election being  
received.

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protest.

acts of Assembly, nor did any of the causes occur, or any of the events happen or take place, specified in such act or acts of Assembly, which justified the said mayor to exercise the power or authority of continuing or keeping the polls open. The weather, on Monday, 27th April, 1829, the first day of the election in the said borough, being fair, calm, and uncommonly good, every person qualified to vote had an opportunity of voting, had he an inclination to do so. Few, very few voters, if any, reside a mile from the court-house of the said borough, and the most populous parts of the said borough were less than half a mile from the court-house thereof. Proclamations were frequently officially made at the door of said court-house, summoning the citizens to vote, and the bell of the court-house also frequently rung, to give notice that an opportunity was offered to every person to vote. There were frequent intervals of time during the day, on Monday, the 27th of April, 1829, in which very few votes were given, and some intervals of time in which no votes were given, these intervals occurring oftener some hours before the setting of the sun; such circumstances certainly afford no proof that the voters were too numerous to be polled on the first day of the election in the said borough. Objecting to, and protesting, therefore, for the reasons above stated, against your right to claim and count the votes, as legal votes, polled for you on Tuesday, the 28th, and on Wednesday, the 29th of April, 1829, I proceed now, reserving to myself all the benefit and force of the foregoing objections and protestations, to give a list of the votes on your poll, taken at the court-house in the said borough of Norfolk, on Tuesday, the 28th, and on Wednesday, the 29th of April, 1829, to which I object, for the several reasons stated and annexed to each name respectively.

This is a copy taken from a paper containing the list of votes given to George Loyall, in the borough of Norfolk, and being objected to by T. Newton as being illegal. See that list, for the original of which this is a copy.

*Second letter of the sitting member.*

To the Hon. WILLIS ALSTON,

*Chairman of the Committee of Elections:*

Second letter  
of the sitting  
member.

SIR: I respectfully submit to the committee a few remarks on the speech which was made by the petitioner, in support of his claim to the seat in the House of Representatives occupied by me. I shall not trespass long on their patience. The speech consists more in assertion than argument. Whenever the law, to subserve his purposes and views, is too limited in its provisions, a free and liberal construction is to be given to it, and whenever it is general and comprehensive, it is to be contracted. Rights and privileges have no firm basis for their support, and the constitution and the law afford no landmarks by which the judgment is to be guided in the



formation of a just and correct decision. No argument, supported either by law or fact, has been made to do away the objections submitted by me to the consideration of the committee, against the exercise of the power of the mayor to continue the poll over. In the early legislation of the State, the power to continue the poll over was not given even to the sheriffs. The reason for giving it to them was, that the population increasing in the large counties, and court-houses being rarely conveniently located, the freeholders distant from them, as the law then was, were frequently prevented from voting. The Legislature, to remedy this evil, proceeded with much caution. It did not give a discretionary power to continue the poll over, but limited the exercise of it, as the following citation shows: "If the electors who appear, be so numerous that they cannot all be polled before sunset; or, if by rain, or rise of watercourses, many of the electors may have been hindered from attending, the sheriff, or under-sheriff, may and shall, by request of any one or more of the candidates, or their agents, adjourn the proceedings on the poll until the next day, and so from day to day for four days, if the same cause continue; giving public notice thereof, by proclamation at the door of the court-house or other place of holding such elections, and shall, on the last day of the election, conclude the poll according to the directions aforesaid; but, if the poll to be held at any such elections is not closed on the first day, the same shall be kept open two days thereafter at least."

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Mr. Newton's  
second letter.

Thus the law speaks on conferring the power to continue the poll over, and by its provisions clearly designates the sheriff or under-sheriff as the sole and exclusive depository of it. Had the Legislature intended to give the same power to the mayor of a borough or corporation, his official name or character would not have been omitted in the law. When it gave that power to the sheriff, *eo nomine*, the name of the sheriff is expressed. A sheriff is an officer to whom is entrusted, in each county, the execution of the laws. A mayor is a judicial, and, in a few instances, a ministerial officer of a borough or corporation. This distinction in officer and character is always kept in view by the Legislature, in conferring power either on the one or the other. If the Legislature had intended that the power to continue the poll over should be possessed by all officers who are empowered to hold elections, the phraseology would have been general, and not specific, as it is. No form of speech or language could be better adapted, than that used by the Legislature, to limit the power to the exercise of the sheriff exclusively. If the language or words, in which the will of the Legislature is expressed, are not to be interpreted or construed according to rules already laid down, and immemorially observed and adhered to by all great statesmen and jurists, legislative enactments would be worse than useless. They would be



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no security to life, liberty, or property; they would pretend to bestow what they could not secure. The tribunals constituted to execute law and dispense justice, would not be tribunals merely to expound and administer it, but tribunals with a carte blanche to make it or supply omissions, to alter or amend it at will and at pleasure. All constitutional lines drawn with skill and care, marking with exactitude the boundary to each grant of power given to each separate and distinct branch of Government, would be erased, and order reduced to chaos. I trust and hope that patriotism and high considerations of policy will not suffer the lights which have successfully and propitiously directed the course of this Government and all its branches, to be extinguished. The petitioner, to support the right of the mayor to exercise the power of continuing the poll over, cites the latter part of the following section of the act of Assembly. I will transcribe the whole section. "In all cases whatsoever, when by law the sheriff is directed to hold an election, in case of the death of the said sheriff, the senior magistrate, and in his absence, inability, or incapacity, by being a candidate, the second, and so in succession to the junior magistrate, is hereby authorized, empowered, and required to perform the duties of the sheriff prescribed by law in similar cases. And if the mayor of any city or borough, entitled to representation in the General Assembly, shall, by death or any other cause whatever, be unable to attend and conduct the election according to the provisions of this act, then the recorder, or, if there be no recorder, or he be unable to attend, the senior alderman capable of attending, shall attend and conduct such election according to law." The petitioner contends that the latter part of the above section, beginning at the words, "And if the mayor," &c., gives to the mayor the power to continue the poll over. His cause must be a hopeless one, when he is driven to such shifts and wild constructions to support it. By what rule laid down for the interpretation or construction of words or laws, can he sustain such a construction? Such a rule exists nowhere, except in his fancy. It is incompatible, it is at war with every rule which the science of jurisprudence sanctions. This sort of hair splitting suits not the character of the august body that is called upon to decide on a great and important question. What is the plain, common sense, or legal construction of that paragraph of the above section? Does it give any new power, either to the sheriffs of counties, or to the mayor of any borough or corporation? The plain and evident meaning of that section is this: By the law, as it stood prior to the enactment of that section, the sheriffs of counties, and the mayors of boroughs, in their respective counties and boroughs, were the officers appointed to hold elections. Should either or both die, or otherwise be unable to hold any election, no election could be held, as the law had made no provision for such an occurrence: under such cir-

cumstances, no election could be held. Some cases of this kind having happened, the Legislature, seeing the mischief, noticed it, and enacted the said section, to prevent a recurrence of it. The section only authorizes the senior magistrate of a county, on the death of the sheriff, &c., and the recorder of a borough or corporation, on that of the mayor, &c., to perform the same duties that the sheriff or mayor was required to do, according to the powers invested in each of them by previous laws, and that is all. The section confers no new power; nor can the most adroit or metaphysical special pleader that ever existed torture it to give a jot more of power to either the sheriff or the mayor, or either of the other persons mentioned, than the law gave to the sheriff or mayor prior to its enactment. This section is deserving notice, and is important, inasmuch as it clearly shows and manifests that the Legislature, in conferring powers on, and requiring duties to be performed by a sheriff or mayor, always preserved and kept distinct the line of demarcation between those officers, never blending or confounding them together. The petitioner, desirous of making the mayor of the borough a more important officer than the law ever intended he should be, determined that he should have the exercise of the power of continuing the poll over, offers another suggestion in support of his right to exercise that power. The petitioner says that the law does not give the mayor the power to make proclamations at the opening of the polls, or at any other time during the pendency of the election, yet he either makes, or causes proclamations to be made, and that this exercise of power on his part has never been objected to. This is catching at a straw. To this attenuated sort of logic, if so it may be called, a very plain and satisfactory answer can be given. To make such a proclamation, no grant of power is necessary, because it is one of those little unimportant acts that is incidental or implied, growing out of the provisions of the law authorizing the sheriff or mayor to hold an election. It is the shadow of the substantive power: courts may be constituted, and general or special jurisdiction may be given to them; the law creating such courts may be silent on the point of opening and adjourning them, yet cannot the judges order a proclamation to be made at the opening and adjournment of the same?

But far different is the power to continue the poll over; it cannot be implied; to be exercised, it must be given, and expressly conferred; it is a substantive power, and belongs to that class of powers. The poll cannot be continued over, without the power to do so be either generally or specially granted. This power, I contend, was not a general one, authorizing any officer empowered to hold elections to continue the poll over. To the sheriffs of counties only was it given. The reasons urged by me against the exercise of this

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second letter.

power by the mayor, are contained in a paper addressed by me to the committee on the 4th instant; they clearly prove that the law did not confer on the mayor such a power; and its omitting to name the mayor, when it bestowed this power on the sheriff, is decisive that it intended to exclude the mayor from the exercise of it. If this power to continue the poll over had not been given to the sheriffs, the sheriffs could not have exercised it; which evidently shows that, to exercise it, it must be granted; and so thought the Legislature. The petitioner urges, in support of his position, that the poll opened late on the first day. But is this a reason why the mayor, contrary to law, should continue the poll over? If the candidates should have consumed the whole day in speeches, and the mayor and the citizens should have tolerated it, no complaint could be with propriety made by the citizens, that they had thereby lost the opportunity of voting; nor by the candidates, who were in fault, that they had been deprived of votes. The election day is the day of the people; they have unlimited control over it.

They had a right, if very solicitous to vote, to demand that the polls should be opened to receive their votes. I have known instances, and they have not been unfrequent, when the candidates being disposed to make long speeches, and waste time, the people came forward and demanded that the poll should be opened, and compelled the sheriff to open it and take their votes. If the candidates chose to indulge themselves in long harangues, they might have done so at other places than at the court-house, and given to those who preferred voting to hearing of speeches, the opportunity to do so. This ground is certainly untenable. It is a mere mathematical point; it is too diminutive to form the basis of an argument to justify the mayor to exercise a power, and that, too, in violation of law. There was time enough after the citizens began to vote for taking every legal vote in the borough. I assert this with confidence, and many of the most respectable citizens of the borough have frequently expressed the same to me. There were intervals of time, in which few votes; and some in which no votes were polled; and those intervals of time occurred in the evening of the first day of the election, the 7th of April last, when application was made by the petitioner to continue the poll over, on account, as it is stated, that the voters were too numerous to be polled in one day. At that time I saw, to the best of my belief, and I think I am not mistaken, not more than two or three persons who came to the poll, and claimed the privilege to vote. Time enough had been afforded during the intervals which occurred during the day for such persons to have voted. Their neglecting the opportunity when given to do so, should not be made the means of injustice, had the mayor the power to continue the poll over. It often happens, in warmly contested elections, that voters are kept in reserve

to answer such purposes, to obtain a continuance of the poll over. I charge not the petitioner, nor any other person, with acting in this manner, but I have, as well as others, strong suspicions that in this case it was done, but by whom it is not known. Those who act in this manner take care to keep their own secrets; no argument can be drawn from the votes polled on the second and third days of the elections, that the votes, I mean the legal votes, could not have been polled on the first day, for this plain reason: there are many citizens who are averse to engage in contests of this sort, and on that account, and for other reasons, do not wish to vote, and that, nothing short of absolute necessity could induce them to vote. I know this to be the case in the borough election. Most of those who did not vote on the first day, abstained from doing so, not for want of an opportunity to vote, but from a previous determination formed not to vote. Every person who has been in public life knows this to be true. Such an argument, therefore, as the petitioner urges, can have no weight in justifying the mayor to continue the poll over. In the contest between the petitioner and Mr. Steed, some years ago, to represent the borough in the State Legislature, I stated in my address to the committee, dated the 4th instant, that the mayor refused to continue the poll over at the request of Mr. Steed. Of this the petitioner states he has no recollection, and that he does not believe that such an occurrence took place. I stated the circumstance because it had been mentioned to me, and because, in some of the depositions taken on my part, the deponents state, to the best of their belief, such a request was made, and refused by the mayor. The petitioner lays stress on the phrase, to the *best of the belief of the deponents*, and says, this is evidence strong that they had no knowledge of that event happening. The manner in which this testimony is worded, gives greater credit to it, and entitles it to the utmost confidence. Every upright and honest man delivers his testimony in a style of modesty, and rarely speaks positively of events, even when he entertains no doubt of their existence. In descanting on these depositions, the petitioner mentioned that they had voted for me, insinuating thereby, as I suppose, that, as to their evidence, many grains of allowance should be made. How the virtues of men are to be held in estimation, or to rise and sink in confidence, by an honest preference of one candidate to another, and how their competency or credibility as witnesses should be measured by such a rule, it is not my province to decide. But this much I will say, that, if it should please the House of Representatives to appoint commissioners, intelligent and impartial, to make a canvass of the votes objected to, and send them to the district I have the honor to represent, it would afford me the greatest gratification, as such a measure would ensure to all parties justice. Before such commissioners, the respectability of the witnesses on

1839.  
21st CONGRESS,  
1st Session.

Mr. Newton's  
second letter.

1833.  
2d Court, 1st Session.

Mr. Newton's  
second letter.

both sides would be weighed and ascertained, and the confidence due to each be honorably awarded. Without insinuating aught against, or detracting from the merit of, any man, I will venture to say that the characters and virtues of the civil officers before whom my depositions were taken, will, as well as of the witnesses whose depositions were taken on my part, lose no lustre by any comparison that can be made with those on the part of the petitioner. Under its appropriate head further remarks will be made touching this point.

The petitioner has expressed his confidence that he has a majority of the legal votes over me. He may endeavor to give all the importance he pleases to such declarations, but I firmly believe that there is not a man in the district who knows how that election was conducted, and the people who voted, and will dispassionately and impartially speak his mind, but will say that I am entitled to a large majority of legal votes over him. Many are fully satisfied that the petitioner has more bad votes on his poll in the borough of Norfolk than his majority over me there. He could not object, on my poll in the borough, to more than 27 votes—his not objecting to a larger number, if he could, is not owing to forbearance—19 or 20 of which are good votes. On his poll, in the borough, I objected to 166. I believe I am entitled to a majority of legal votes in the borough, and a further examination of the poll would prove it. The passions and heat of the day have passed away, and things now are seen through a clear medium. Of the 122 votes to which the petitioner has objected on my poll in the county of Norfolk, I entertain the belief that not 20 illegal votes can be established.

Before dismissing this branch of the subject, a few remarks are necessary on some statements made by the petitioner, that his friends complained that the mayor decided against him on points of law that were clearly in his favor, and, to show the impartiality of the mayor, stated he did not vote for him. All this amounts to nothing. The continuance of the poll over, at the petitioner's request, and the reasons urged by me already against this exercise of power, manifest not his impartiality. As to his not voting for the petitioner, I suppose he had some civil reason, which it is not my wish to subject to any scrutiny.

The second head I shall now consider. I will confine my remarks to a very few points. I have, in my address to the committee on the 4th instant, objected to the depositions taken by the commissioners appointed by the borough court, and to their being read as evidence. The petitioner, in his efforts to show the legality of that board, and its competency to take depositions, asserts that lawyers of eminence, and all of his numerous friends, support him in pursuing that mode of taking depositions. In my objections to this mode, pursued by the petitioner, I am justified by the opinions of



sound lawyers, as well as of all my friends, who are, to say the least, fully as numerous and as respectable as those of the petitioner. I have not heard one express a doubt on the incompetency of that board to take depositions. The reasons urged in my address of the 4th instant, lose nothing of their force and weight by any thing the petitioner has said; and I believe every man who will dispassionately consider and weigh those objections, apart from all extraneous circumstances, will be satisfied that they are too strong to be got over. The petitioner further asserts that the commissioners were either magistrates or notaries; and they were sworn before a magistrate before they entered on the duties of their office: there was one alderman of the borough of Norfolk, the other four were notaries and inhabitants of the borough. It is clear that the commissioners did not act as magistrates nor as notaries, but as commissioners, deriving their authority from their appointment in virtue of an order of the borough court, made at the instance of the petitioner; as such, the offices of magistrates and notaries were become defunct, when by that process they resurrected as commissioners; in consequence of this, the validity of the depositions, in law, must be derived from the legitimate or new birth of the commissioners, which, if not established, and this cannot be done, the depositions brought into existence by their acts or performance must be *nullius in terra*. Having prepared the way for the chief point, that the commissioners appointed by the borough court had not the power to take depositions in a contested election for a seat in Congress, it becomes necessary to see under what law this commission was created, and what are the powers given to them.

1830.  
21st CONGRESS,  
1st Session.

Mr. Newton's  
second letter.

1st. Under what law does this commission derive its being and authority to take depositions in a contested election for a seat in the House of Representatives of the United States? On an examination and investigation of this question, it appears that no act of Congress can be found to authorize any court whatever to appoint such commissioners. It is plain, then, that such a board of commissioners cannot trace its lineal descent from any act of Congress. As to the laws of the United States, that board has then no parentage.

Does that board derive its existence from the constitution of the United States? Art. 1, sec. 5: "Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business." These powers belong to each House; neither House permits these powers to be exercised by others; they are exercised by each in its distinct and separate character. The board of commissioners, therefore, cannot trace its legitimacy to the constitution of the United States. It has there no "local habitation or name."



1830.  
21st CONGRESS,  
1st Session.

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second letter.

From what source, then, can this board of commissioners derive its being and power?

Does any law\* of the State of Virginia take this fatherless progeny to its bosom, and own them? Can a law of Virginia, not relating to contested elections in Congress, and made, too, for other purposes no ways connected with them, be made applicable to purposes which not one of its enactments makes provisions for? If such a law can be construed into such a construction, if it can be made applicable to this contest between me and the petitioner, then I boldly assert that the constitution is a deception, and law a fiction. To talk of rights, in the face of the violation of all rights, is an insult superadded to injustice. If such reasoning be correct and sound, then the court of Norfolk borough, in appointing such commissioners in this contested election between me and the petitioner, had no jurisdiction by law to appoint such commissioners. The whole subject, then, was *coram non iudice*, and the appointment of such commissioners by the borough court, a nullity. The depositions, therefore, taken by the commissioners, cannot be received as legal evidence.†

The legitimacy of the board of commissioners is, therefore, not to be derived from any law of Virginia; it can be found nowhere.

The petitioner has stated to the committee that depositions taken before such commissioners would be read as evidence in either branch of the Virginia Legislature. If the petitioner means that depositions taken under the section referred to, in a contested election for a seat in either branch of the Virginia Legislature, would be read as evidence in the Virginia Legislature, I grant it; because such depositions would be taken in such a case according to the provisions of the law. But, when he attempts to legitimate his board of commissioners, and clothe them with powers which no law gives to them, I deny the correctness of his argument, and the truth of his inference. Does he not see that he assumes in his premises what the law does not allow him to include in them, and that he is expounding the provisions of the law to suit his own views and purposes, contrary both to its letter and spirit?

The petitioner says depositions taken before respectable persons, whether according to form or not, should be read.

One plain answer is only necessary. A seat in the House of Representatives of the United States is of too great importance to make an access to it very easy, by a relaxation of the rules to be observed in taking evidence. The evidence that would be rejected in a warrant case, for two dollars, should not be received to support a claim to a seat in one of the most august bodies in the world. If bribery and

\* See copy of the law annexed, B.

† See section of the law relating to this subject, paper B.

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corruption should ever disgrace and tarnish the American character, they will first become agents to aid aspirants to grasp legislative and executive honors. I have objected to many votes, on the ground that the persons giving those votes were aliens, and have required that they should prove that they have been naturalized, by record evidence, to entitle them to vote. To this the petitioner says that parol testimony being admitted to prove the right of a freeholder to vote, parol testimony should be received to prove citizenship. In the examination of witnesses to prove the legality of votes, the land books are resorted to, and the record of courts, and also the knowledge that the citizens possess and have, that their friends and neighbors are qualified voters. There can be no deception in this, and, if attempted, could be easily detected. But as to persons known to be aliens, no proof short of the production of the certificate of naturalization, in a competent court, should be allowed; admit that parol testimony is sufficient to prove citizenship, and every alien can vote. And if this doctrine has been practised upon, by the board of commissioners, in taking such testimony as to citizenship, it is an additional reason why depositions taken by them should not be read as evidence.

The petitioner, in noticing certain depositions taken in my behalf, to prove that no cause existed for continuing over the borough poll, and also to prove that, at an election between him and Mr. Steed, on the request of the latter to continue the poll over, the mayor refused to do it, remarked that the depositions so taken were given by persons who voted for me. Now, I must be permitted to ask the petitioner, if every person on the board of commissioners did not vote for him, and if the greater part of them were not among the most active of all his friends in promoting his election, and whether he did not get all those he could who voted for him, to prove, respectively, their own votes, or those of others who gave their votes for him. My depositions in the borough were taken by a notary, the supporter of the petitioner, and, in several other places, by persons supposed to be favorable to the pretensions of the petitioner.

The petitioner has remarked that the depositions taken for me at Portsmouth were badly taken; that the writer sometimes was guilty of errors in orthography, and that he was not qualified for writing down depositions. In answer to this charge, I can, with truth, say, for I felt the inconvenience to which I was often subjected, that it was difficult to get a person to do such disagreeable business. Most of my friends and acquaintances, who were best qualified for such an undertaking, were generally men of business, and, though willing to do any thing for me, could not neglect their affairs without injury to themselves. Under such circumstances, I could not, in conscience, ask at their hands such a sacrifice. The young man who wrote down the questions and answers,

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is remarkable for his modesty, and for his exemplary conduct, and his character is free from reproach. In the presence of the magistrates and the petitioner, in the first examination, he wrote down the words of the witnesses. If the commission of errors in orthography be a reproach, it will attach to many who, though they may not possess the orthographical skill and pedantry of a pedagogue, derive from nature strong minds and honest hearts. Some men there are, who supply in every word every letter, dot every i, and cross every t, but whose words never represent ideas.

The magistrates who presided in taking depositions, rank among the most respectable of our citizens. Where they are known, they are esteemed by those whose esteem is worth having; their services are performed without fee or reward; their honors do not flourish in rich and splendid ores; their consciences and their patriotism make them evergreens. In the presence of such men my depositions were taken.

I remain, with great respect,

Your obedient servant,

THOMAS NEWTON.

WASHINGTON, February 17, 1830.

B.

*Section of the act of the Virginia Legislature pointing out the mode of proceedings in contested elections in the State Legislature, as to the taking of depositions in contested elections for a seat in the Virginia Legislature.*

Law of Virginia for taking evidence, &c.

“When the contest is for the office of Senator, any one or more of the courts in the senatorial district, or, when it is for the office of a Delegate, the court of the county, city, or borough, shall, upon the application of either party, appoint five commissioners to take depositions of such witnesses as shall be produced to them; any three of which said commissioners shall be sufficient for the purpose. But no commissioner shall act without having first taken, before some justice, an oath to act impartially. Reasonable notice, in writing, of the time and place of taking such depositions, shall be given by either party to the other.” See Tate’s Digest, p. 189, sec. 29.

NORFOLK, September 8, 1829.

Notice to Mr. Newton.

SIR: By virtue of the order entered at the last May term of the hustings court of the borough of Norfolk, appointing commissioners in my behalf to contest your return, as the member returned to represent this district in the twenty-first Congress of the United States, I shall proceed on Friday, the 11th instant, between the hours of 10 A. M. and 6 P. M. at the court-house in the town of Portsmouth, in the county of Norfolk, to take the depositions of William

H. Wilson, deputy clerk of the said county, and others, in further support of the objections I have heretofore made to certain votes on the poll taken for you at the aforesaid court-house ; and, also, to remove the objections you have made to certain votes on the poll taken for me at the said court-house, in the county aforesaid, at the last election for member of Congress ; and should the said depositions, or all of them, not be completed on that day, I shall apply to the commissioners to adjourn from time to time until the same be completed. You are invited to attend personally or otherwise at the abovementioned time and place.

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Your obedient servant,

GEO. LOYALL.

THOMAS NEWTON, Esq.

JULY 23.

On motion of Mr. ALSTON,

“*Ordered*, That George Loyall have leave to occupy a seat within the bar of this House, pending the consideration of the report of the Committee of Elections upon his memorial, and that he have leave to speak to the merits of the memorial, and the report of the committee thereon.”

The evidence submitted to the Committee of Elections was, on the trial of the case, laid before the House, and comprised over three hundred pages of closely printed matter. Its cumbrous form prevents its insertion here, and condensation is nearly impossible. It was the object of each party to impeach the votes given for the other, by the application of testimony to the individual cases to which each had taken exceptions : and it was attempted, on the part of Mr. Newton, also, to set aside the entire poll of the borough of Norfolk, for the second and third days of the election, on the ground that the mayor had no legal power to adjourn the poll, or, if he had, that the contingency had not happened on which the exercise of the power depended. The testimony may be classed under two heads: 1st, that which tends to impeach and sustain individual votes ; and 2d, that which aims to invalidate the Norfolk poll of the two last days.

Previously to the taking of testimony in the case, each party had furnished the other with a list of the votes on his adversary's poll, to which he excepted, with the reasons of such exception. The number excepted to on Mr. Newton's poll, by the petitioner, amounted to 184 ; those excepted to on Mr. Loyall's poll were 285. At the instance of the petitioner, five commissioners were appointed at the hustings court of Norfolk ; before a majority of whom the testimony on his part was taken, under protest, however, by the sitting member. But this testimony was admitted by the committee, having been taken before persons authorized by the laws of Virginia to administer oaths. To follow each of the nume-

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rous witnesses through the maze of testimony that was adduced, to assail and defend the votes excepted to, would be impossible, and will not be attempted. But that which regards the validity of the Norfolk poll, on the second and third days of the election, being less voluminous, and regarding a point which, in a former contest, was elaborately discussed, is given at large. In the case of Bassett against Bayley, where the sheriff, on the plea that more voters had appeared than could be polled the first day, had adjourned over, it was decided that the evidence did not sustain that plea, and that the proceeding was, therefore, illegal. How far that case was analogous to the present, in this particular, can be seen only from the evidence, which is accordingly here submitted.

On the part of Mr. Newton the testimony of James Tucker and others was offered, as follows :

On Thursday, the 1st of October, the parties again met, by counsel, and the depositions were continued.

James Tucker being now produced, and being first duly sworn, deposes and says as follows :

Evidence re-  
garding the ad-  
journment of  
the poll.  
James Tucker,  
witness.

1. What is your age, and how long have you been residing here ?

A. I am in my seventy-first year, and have been residing here nearly forty years.

2. What distance of time is necessary to carry a voter from the extreme points of Norfolk to the court-house ?

A. From ten to twenty minutes.

3. Have you not witnessed many warm elections in this borough ?

A. I have.

4. Are you not of opinion that, if the day be fine, one day is sufficient to poll all the legal votes of this borough ?

A. I am.

5. Has there ever been an adjournment of the polls, for any cause, previous to this election of Mr. Newton and Mr. Loyall ?

A. There has not, to the best of my knowledge. I have never heard it nor seen it, and I have generally been here on such occasions.

6. Do you know if there ever was an application, by one of the candidates, at any election, either federal or State, to adjourn the polls and keep them open ?

A. I do not, of my own knowledge, but I was informed that, in the contested election between Mr. Loyall and Mr. Steed, the latter gentleman made such an application, and was refused.

7. Upon what ground did you understand that application was made ?

A. I was informed that it was on account of some voters coming in just as the polls were about to be closed.

8. Were you present at that election ? And state if the contest was warm and animated.

A. I was confined at home at that time by lameness, but there was a considerable bustle and stir in town, and many applications were made to me to come here, and conveyances sent to bring me here. At that election there were 435 votes polled: for Mr. Loyall 218, for Mr. Steed 217, two of which were on the back of the poll.

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Evidence relative to the adjournment of the polls.

James Tucker,  
witness.

9. Do you recollect any other warm and animated elections in the borough? If yea, state them.

A. I remember several, particularly the one in 1809, between Archer and Maxwell, at which time there was also a congressional and senatorial election. At that time, from a reference to the poll, there appears to be 260 for Archer, and 222 for Maxwell. At that time the town was much more prosperous and populous than now.

10. Was not this election between Archer and Maxwell, and for Congress and the Senate, conducted with great warmth, zeal, and party spirit?

A. It was, and with a great deal of cross-examination of the voters.

11. Was it hinted or thought of at that time that the mayor, who conducted that election, had any right to adjourn the polls?

A. I never heard it was.

12. Did the candidates at that election address the people?

A. They did, and some of them at considerable length: one of them said but little.

13. At what hour did the voting commence on that day?

A. I do not recollect, but I suppose about 12 o'clock; it could not have been earlier, as there were so many long speeches, and probably it was later, as I rather think it was.

14. Were you present at the last congressional election between Thomas Newton and George Loyall? If yea, state if there was more warmth, zeal, and party spirit displayed than at the election between Maxwell and Archer.

A. I think it was pretty much the same.

15. Was the day fine? If yea, was there any obstruction, to your knowledge, to all the voters voting on the first day of the election?

A. The day was very fine: there was no obstruction that I know or have heard of.

16. Were you, throughout the day, off and on, at the court-house?

A. I was, from the time the doors were opened, except at a small interval, until the polls were adjourned.

17. Was the voting incessant, from the time the polls were opened until they were adjourned? If nay, were there any intervals? and if yea, at what time of the day were those intervals?

A. The voting was not incessant; there were many intervals during the day, until the polls were adjourned; when Mr. Holt had the bell rung, and proclamation made for the voters to come in and vote.



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Testimony con-  
tinued.  
James Tucker,  
witness.

18. Was not the bell kept ringing throughout the day to bring up the voters?

A. Occasionally it was.

19. You have said there were many intervals during the day, what space of time do you suppose elapsed?

A. I suppose from five to fifteen minutes.

20. How many votes were polled on the first day of that election?

A. 165 for Newton, and 238 for Loyall, making in all 403.

21. Are you not satisfied, from your observations on that day, that many more votes might have been polled?

A. I am, and that every good vote in the borough might have been taken with ease.

22. Were not the friends of Mr. Loyall extremely active throughout the day?

A. They were.

23. Are you not perfectly satisfied that the election between Maxwell and Archer, and Steed and Loyall, had as good grounds to be adjourned as the one between Newton and Loyall?

A. Fully.

24. Then, sir, as the voting was not so incessant on that day, and as there were considerable intervals during the day, in which no votes were polled, was there any other known cause that called for an adjournment of the polls?

A. None that I know of.

*. Cross-examined by Mr. Loyall's counsel.*

1. When was your attendance called to the subject of your present deposition, and by whom?

A. Soon after it was understood there would be a contest, and by Mr. Newton.

2. Why were you then not interrogated on this subject on your previous examination?

A. There was nothing said to me on the subject yesterday.

3. Have you not reason to believe that some other person was relied upon at that time to show the impropriety of the polls being kept open beyond the first day?

A. Mr. Newton told me on Tuesday night that he intended to take my deposition on the subject. I have no reason to believe that any person in particular was relied on for the purpose.

4. Did Mr. Newton tell you he intended to take the deposition of any other person?

A. To the best of my recollection he did not.

5. Have you not seen Mr. Holt, the mayor of the borough, at the court-house within the last three days?

A. I saw him in the clerk's office, I believe, on Tuesday; he was with Mr. Williams, the deputy clerk, I believe, at the box where the polls were deposited, but I am not certain.

6. Has his deposition been called for by the counsel for Mr. Newton?

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A. Not that I know of.

7. Is he not at least as well qualified to depose to the facts you have stated as yourself?

Testimony con-  
tinued.  
James Tucker,  
witness.

A. I believe he is, and many others.

8. Did he not superintend the last congressional election? Has he not been, for many years, mayor of the borough; and for how many? and how long has he resided in the borough of Norfolk, to the best of your recollection?

A. He did superintend the last congressional election. He has been several times mayor of the borough; I do not know how long he has been mayor; and he has been a resident of the borough for twenty-eight or thirty years.

9. Has it not been his duty for the last ten or fifteen years to conduct the public elections? and has he not generally attended in person?

A. When he is mayor, the law makes it his duty; he has, I believe, generally attended in person.

10. You have stated that you never knew of but one instance where an application was made to keep the polls open longer than the first day, before the last congressional election; this exception occurred in the contest between Mr. Steed and Mr. Loyall, as you state; I presume you refer to the second contest between these gentlemen. As I acted on that occasion as the agent for the first named, and have no recollection of such an occurrence, I was induced, when you made this statement, to request you to call to mind the name of your informant—can you now mention him?

A. I have frequently heard the thing mentioned by several, but cannot recollect who they were.

11. How long was it before the election that Mr. Loyall was announced as a candidate? I refer to the last congressional election.

A. At least two years.

12. Was it not a matter of doubt until the latter part of the week preceding the election, whether Mr. Loyall would consent to stand a poll?

A. It might have been so; but I never heard of it.

13. Was he announced in the public prints in the early part of the week preceding the election?

A. I do not know when he was announced.

14. How long was it before the election that Mr. Maxwell was brought out in opposition to Mr. Grigsby for the State Legislature?

A. From a reference to the poll, I find he received some fifty or more votes; but I do not know when he was brought out, or that he was brought out at all.

15. How long was Mr. Chandler brought out in opposition to Mr. C. Holt before the general election of the district?

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Testimony con-  
tinued.  
James Tucker,  
witness.

A. I really do not know.

16. Was not the opposition, in 1809, in every instance, determined on long before the day of election?

A. I really cannot tell.

17. Were not the voters then marshalled under their respective banners, and marched up in large bodies to the polls?

A. I think the Mechanical Society marched up with their colors.

18. Was there any thing of this sort at the election in 1829? On the contrary, did not the voters come up, or were they not brought up by the friends of the candidates, singly, and obviously without previous arrangement?

A. They were brought up, I believe, both singles and doubles and trebles.

19. Is not the mayor of the borough a remarkably diffident man?

A. The mayor has been married two or three times; therefore, I suppose he is not very bashful.

20. Has he not a very weak voice, and not readily heard in a crowd; better adapted to a chamber than to the tumult of an election?

A. He is a man of soft voice, but can make himself heard when occasion requires.

21. Have you attended many elections not conducted by him? and though he is indefatigable in the discharge of his public duties, does he not proceed with unusual slowness as returning officer?

A. He sometimes does not keep such good order as he might do; but he takes as many votes in a given time as any other man; he is full as swift a man as the returning officer in the county.

22. When you call to mind that freeholders alone vote in the county, while freeholders and housekeepers, with a certain amount of property and apprentices, are entitled to vote at the borough elections, and that the voters are frequently challenged as to their qualifications in some one of these particulars, do you not think you have gone too far in your previous answer?

A. I think not.

23. Do you not think the mayor acted conscientiously in deciding on an adjournment?

A. I do not know what he thought. I think he acted wrong, as it never has been the custom. The day was fine, and I think all the lawful votes might have been given before sunset.

24. Do you think all the votes given at the election could have been taken on that day?

A. I do not think that all the votes, from the dry dock and other places, that were good and bad, for the sake of giving Mr. Loyall a majority, could have been taken in that day.

25. You, I presume, voted for Mr. Newton?

A. I did, as the records will show.

J. TUCKER.

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Testimony con-  
tinued.  
Vincent Lea,  
witness.

Vincent Lea being now produced, and being first duly sworn, deposes and says as follows:

Q. 1. How long have you been residing in the borough of Norfolk?

A. Upwards of nine years.

2. In the course of that time, have you witnessed any warm elections? If yea, state between whom.

A. I have witnessed several that I thought so; particularly the election between Mr. Steed and Mr. Loyall, in 1826.

3. Was that a warm and animated contest?

A. It appeared to me that the friends of each party exerted themselves to the utmost of their ability to bring voters to the polls.

4. Were you present at the last congressional election between Mr. Newton and Mr. Loyall?

A. I was.

5. Will you state if that contest was more warm and animated than the one between Steed and Loyall, to which you have referred?

A. It appeared to be viewed as an election of greater importance, and excited more interest, on account of its political bearings.

6. Were you, off and on, at the court-house during the first day of the election?

A. I was here three several times; at each of which, I suppose I staid an hour.

7. Was not the bell ringing occasionally throughout the day, to call in voters?

A. The bell was frequently rung in the course of the day.

8. Was the voting continual throughout the day, or were there intervals during which no votes were given?

A. There were many intervals in which no votes were given.

9. What space of time did these intervals employ?

A. Generally from five to ten minutes; and I think, in some cases, a little longer.

10. How long will it take a voter to come from the extreme points of Norfolk to the court-house?

A. About fifteen minutes.

11. Do not a majority of the voters live in the business part of the town? and how far is the court-house from that?

A. The business part of the town is more crowded than any other, and it is about three hundred yards from the court-house; though business is done all over the town.

12. What kind of business do you mean that you say is done all over the town?

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Testimony con-  
tinued.  
Vincent Lea,  
witness.

A. There is a number of retail groceries some distance from the market square, where country people stop to deal, in coming to and returning from market.

13. Were the voters on the first day of the election so pressing and so numerous as not to be recorded on that day?

A. I heard of none who were turned away for want of an opportunity of voting.

14. Was the town, on that day, healthy and free of disease? and what was the state of the weather?

A. I believe the town was very healthy, and the weather was very favorable for turning out.

*Cross-examined by Mr. Loyall's counsel.*

Q. 1. How many days was it before the election that Mr. Loyall was publicly announced as a candidate?

A. I was under the impression, some time before the election, that Mr. Loyall was a candidate, though I do not recollect the precise time that he was announced as such in the public papers.

2. Is it not usual for the candidates to be announced some time before the election, where a contest is likely to take place?

A. Sometimes they are early announced, sometimes not.

3. How many days before the election, as near as you can remember, was Mr. Maxwell publicly announced, or was understood by you to be a candidate in opposition to Mr. Grigsby for the State Legislature?

A. I think some two or three days previous to the election.

4. You have stated that the bell was rung several times during the day, is not this a matter of course at elections here?

A. It is usually rung during the day at elections here.

5. If your attention has been directed to the subject, do you not know that our bell-ringer is particularly attached to his vocation, and that he is more frequently required to desist from than perform his duties on public occasions?

A. I know nothing of his attachment, nor do I know whether he is more frequently required to desist from than to perform his duties.

*Re-examined by Mr. Newton's counsel.*

Q. 1. Was Mr. Loyall an opponent of Mr. Newton at the preceding congressional election? If yea, state if it was not generally understood and given out by his friends that he would be so at the ensuing election.

A. There was a general understanding that Mr. Loyall was expected to be a candidate at the last election.

2. What space of time is necessary to inform the good people of Norfolk as to those who will be candidates at elections?

A. Information of that sort spreads very soon. I should suppose in one or two days it might be known.

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*Cross-examined again by Mr. Loyall's counsel.*

Testimony continued.  
Vincent Lea,  
witness.

Q. 1. You have stated that you understood, some time before the election, and before Mr. Loyall was announced in the public prints, that he would be a candidate at the last election, will you be good enough to state the source of your information?

A. It was from frequent conversations with persons in the borough.

2. Did you ever hear it asserted, before he was announced, by any person who professed to have any information on the subject, that he was to be a candidate?

A. My opinion was formed from public expectation.

3. Would two days, in your opinion, be sufficient to enable people to make up their minds as to the merits of a candidate for a seat in Congress who had never before been a member?

A. I think two days would be sufficient where the candidates were such people as Mr. Newton and Mr. Loyall, they being so generally known.

VINCENT LEA.

Joseph C. Cunningham being now produced, and being first duly sworn, deposes and says as follows:

J. C. Cunningham, witness.

Q. 1. Were you present at the last election between Mr. Newton and Mr. Loyall? If yea, state if the voting was as continued and pressing on the first day as to make it necessary to adjourn the polls.

A. I attended on the first day from about 10 till sunset, off and on. At times they were much pressed, but there were intervals of five, ten, and fifteen minutes, when there were no votes taken; and I think all those inclined to vote (good voters) might have been polled on that day with ease.

2. What was the state of the weather, and was the town healthy?

A. The town was healthy, and the weather very fine.

*Cross-examined by Mr. Loyall's counsel.*

Q. 1. Have you examined the polls of the second and third days? Are there not good votes to be found there? And have you inquired why those voters did not attend on the first day?

A. I have never examined particularly, and do not know how many good, or how many bad votes were given on the first day; but I presume there were some good votes as well as bad. I have never inquired why they did not attend.



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Testimony con-  
tinued.

J. C. Cunning-  
ham, witness.

2. At what hour did the voting commence on the first day?

A. Nearly 1 o'clock, as well as I recollect.

3. Do you speak from actual knowledge of the time, or only from your impression that the polls were opened at a late hour?

A. I speak from my impression.

4. Did you ever attend an election where the voting was commenced at so late an hour? and what is the customary hour?

A. I believe the customary hour to be between 11 and 12 o'clock. I never attended an election before.

5. Whom did you vote for at that election?

A. For Thomas Newton.

6. Did Mr. Newton, or his counsel, request you to attend here, to give evidence as to the propriety of continuing the election beyond the first day?

A. Mr. Newton requested me this morning to come up and give my evidence.

7. Did you inform him of the extent of your acquaintance on the subject?

A. No, I did not, the whole of it. I told him I had attended throughout the day.

8. Did he inquire of you whether you had been in the habit of attending elections in the borough of Norfolk?

A. No, he made no such inquiry.

9. Then you know of no reason why he solicited you particularly to testify on this subject?

A. No, I suppose all who attended the election knew as much about the matter as I do.

10. Have you not seen Mr. Holt, the mayor of the borough, in attendance here, for the last two or three days?

A. I have seen him going up and down the steps two or three times to-day.

J. C. CUNNINGHAM.

H. H. Redman,  
witness.

Henry H. Redman being now produced, and being first duly sworn, deposes and says as follows:

Q. 1. Were you present at the last election between Mr. Newton and Mr. Loyall? If yes, state if the voting was so continued and pressing on the first day as to make it necessary to adjourn the polls.

A. The voting at times was very pressing; there was some intermission at times of upwards of ten minutes; the bell was rung during the day, and frequent proclamation made when the voting ceased.

2. Were not those intermissions you speak of frequent?

A. Several of a shorter duration, and two or three of about ten minutes.

3. Was there not sufficient time on the first day of the election to poll the votes of all those who were inclined to vote?

A. I believe all those who were inclined to vote, and who had good votes, might have been polled.

4. What was the state of the weather, and was the town free of disease?

A. The weather was good, and the town, I believe, was free of disease.

5. Do you know, or did you ever hear of any obstacle or obstruction which prevented the voters from attending on the first day?

A. I know of none, and never heard of any.

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tinued.  
H. H. Redman,  
witness.

*Cross-examined by Mr. Loyall's counsel.*

Q. 1. How many votes do you think can be polled in one day in the borough of Norfolk, the weather being good?

A. I do not know; but as it has not, to my knowledge, required more than one day to poll the votes of the borough, I should suppose they might have all been polled on that day.

2. How many good voters are there in the borough of Norfolk, and who felt disposed to vote on the first day of the last election?

A. There are more than 300 voters in the borough, and I suppose all who felt disposed to vote, voted on the first day.

3. At what hour did the voting commence on the first day?

A. From fifteen to thirty-five minutes past 1.

4. You have stated that you knew the vote of the whole borough taken in one day. Did you ever know this done when the voting was commenced at so late an hour?

A. I never knew the voting commenced at so late an hour previous or since.

*Re-examined by Mr. Newton's counsel.*

Q. 1. You say the voting commenced from fifteen to thirty-five minutes past 1. Was there not sufficient time between this and sunset to poll all the legal votes in the borough?

A. I do not know, I must say.

2. Was there not sufficient time to poll all those inclined to vote?

A. There was more time than was necessary to poll those that were polled on the first day, as there were some intermissions.

HENRY H. REDMAN.

Then, on the motion of the counsel for Mr. Newton, the counsel for Mr. Loyall being present, and consenting, these depositions were finally closed.

UNITED STATES OF AMERICA, VIRGINIA, *District of Norfolk.*

Be it known that I, John Singleton Willson, a notary public in and for the district of Norfolk aforesaid, by lawful

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tinued.

authority duly commissioned and sworn, and by law authorized to administer oaths and take depositions, do hereby certify and make known that the foregoing depositions were taken before me, to be read as evidence in the contested election between Thomas Newton and George Loyall, for a seat in the twenty-first Congress, commencing on the 16th day of September, 1829, and ending on the 1st day of October following, beginning with John Dyson, commissioner of the revenue, on sheet No. 1, and ending with Henry H. Redman, on sheet No. 46; and I do, moreover, certify that the several deponents were first duly sworn or affirmed, and their several depositions each subscribed by them in my presence; and I do further certify that each and all of the said depositions were taken in pursuance of the notice hereunto annexed, and between the hours mentioned in the said notice, at the court-house of the borough of Norfolk, and that the taking of the said depositions was regularly adjourned from day to day, in presence of the parties or their counsel. In witness whereof, I have hereto set my hand, and affixed my seal of office, this third day of October, 1829.

JOHN S. WILLSON, *Notary Public.*

Evidence on  
the part of the  
petitioner.

The testimony on the part of Mr. Loyall is as follows, beginning with that of William C. Holt.

The depositions of William C. Holt, of John E. Holt, and of Hugh Blair Grigsby, taken at the court-house of the borough of Norfolk, on Friday, the 3d day of July, 1829, before Giles B. Cooke, Albert Almand, and William W. Sharp, three of the commissioners appointed by the borough court of Norfolk, (as appears by the order, an office copy whereof is hereunto annexed,) which said depositions are intended to be read as evidence before the Congress of the United States, or other proper tribunal, in a certain contested election between George Loyall and Thomas Newton, pursuant to the notice annexed.

W. C. Holt's  
deposition.

The deponent, William C. Holt, being first duly sworn by Giles B. Cooke, one of the commissioners, who is also an alderman of said borough, deposes as follows, to wit:

Question by George Loyall. Were you a candidate for the State Senate, and did you appear as such at the last April election in the borough of Norfolk?

A. I was a candidate, and appeared as such at that time.

Question by the same. At what hour were the polls opened on the first day of that election?

A. About 1, or half past 1 o'clock.

Question by the same. Was that the usual hour of opening the polls in the borough?

A. No: the hour of 10 A. M. is the usual time.

Question by the same. What cause or causes delayed the opening of the polls until that late hour?

A. The number and length of the addresses of the several candidates for Congress, the State Senate, and the State Legislature, to the electors; to wit, by Mr. Maxwell, who spoke at length in declining the poll; by Mr. Chandler, a candidate for the State Senate; by Mr. Newton, Mr. Loyall, and by myself. Mr. Newton and Mr. Loyall both addressed the electors twice, and at considerable length.

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tinued.  
W. C. Holt,  
witness.

Question by the same. Did it appear to you that I was under the necessity of replying to Mr. Newton?

A. It did so, most assuredly. You were bound to do so in your own defence, from the charges there preferred against you by Mr. Newton and his friends.

Question by the same. From the whole course of the election on the first day, as well as from what transpired at sunset, being the close of that day's poll, were you of opinion that it was the duty of the returning officer, or officer conducting the election, to keep the polls open beyond that day?

A. I was: the case expressly provided for by the act of the State Legislature, prescribing the mode of conducting elections, seemed to me to have occurred; the voters were too numerous to be polled before sunset. A conclusive proof of this appears from the fact that more than one hundred voters, many of whom were present to vote when the poll was closed at sunset on the first day, were polled on the next and subsequent days. I am, moreover, convinced that the number of legal voters could not have been polled between the time of opening and closing the polls on the first day, according to the mode of conducting elections in the borough.

Question by the same. How long has it been since you have been a candidate for the Senate of Virginia?

A. I was first a candidate in 1817, and ever since that time have been a candidate.

Question by the same. Have you, on any former occasion, known the polls to have been opened at so late an hour?

A. Never: neither here nor elsewhere, in this State.

Question by the same. As you have served as a member of the House of Delegates for several years, and for the last eight years as Speaker of the Senate, is it not probable that if such a case had occurred, you would have been likely to know it?

A. It is probable.

WM. C. HOLT.

Sworn to and subscribed before us, at the time and place in the caption to these depositions mentioned.

G. B. COOKE,  
W. W. SHARP,  
ALBERT ALLMAND, } Commissioners.

John E. Holt was next duly sworn by Giles B. Cooke, one of the commissioners, who is also an alderman of the borough of Norfolk.

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Testimony con-  
tinued.

J. E. Holt, wit-  
ness.

Question by George Loyall. Are you the mayor of this borough? and did you, in that official character, conduct the last election in this borough for member of Congress?

A. I am the mayor, and in that character conducted that election.

Question by the same. Did you receive a note from me on the evening preceding the election?

A. I did: but I think I destroyed it.

Question by the same. What was the purport of that note?

A. In it Mr. Loyall suggested the propriety of opening the polls at half past 9 o'clock on the next day. This I declined, determining to fix it at 10 o'clock, which was the usual hour. In a subsequent interview with Mr. Loyall, on the day preceding the election, he assigned as a reason for wishing the polls opened earlier than usual, that great interest was manifested in the election, and that he was anxious that all the electors might vote. However, I caused notices in the newspapers to be inserted, fixing the time at 10 o'clock, and made all other necessary arrangements to open the poll at that hour.

Question by the same. Were you present at, and ready to open the polls at 10 o'clock?

A. I was.

Question by the same. At what hour were the polls opened?

A. I cannot say precisely, but I believe between 1 and 2 o'clock.

Question by the same. For what number of candidates were you required to open polls, and how many poll keepers did you find it necessary to employ?

A. There were two candidates for Congress, two for the State Senate, and two polls opened for a member of the Assembly: there were three poll keepers.

Question by the same. From what causes did it happen that the polls were not opened at the usual hour?

A. The delay was produced by the addresses of the candidates to the voters.

Question by the same. How many addresses were made by the candidates to the voters before the polls were opened?

A. Seven.

Question by the same. Who first addressed the people, Mr. Newton or myself? and how often did each speak?

A. Mr. Newton spoke first, Mr. Loyall replied; Mr. Newton rejoined, and Mr. Loyall replied to the rejoinder.

Question by the same. Did it appear to you, from the character and bearing of Mr. Newton's remarks, and the interest of the topics involved, that it was incumbent on me to reply to him?

A. I thought it was, and I thought an equal obligation imposed on Mr. Newton to reply to Mr. Loyall.

Question by the same. Had you at the time, or have you now, any doubt as to your possessing the same power and

authority with which the persons authorized by law to hold elections for members of the Assembly in the several counties are invested, to continue and keep open the poll beyond the first day of the election for members of Congress within this borough?

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Testimony continued.

J. E. Holt, witness.

A. I had no doubt at the time, and my opinion is unchanged.

Question by the same. Did any one of the contingencies, within the scope and meaning of the law, clearly occur, to make it your duty to continue and keep open the poll beyond the first day of that election?

A. There did. There was not time between the opening of the polls and sunset to take all the voters who appeared at the polls on the first day. The hour for closing the poll arrived while I was examining a voter, and at that moment another elector appeared to give his vote, and I heard voices in the crowd saying "here are more voters;" and, as far as I understood and believe, there were other persons there ready to vote.

Question by the same. Was there any intermission of consequence in taking the votes on the first day?

A. There was not.

Question by the same. The qualifications of the electors in this borough differing as they essentially do from those in the county, are you often, in elections, under the necessity of referring to the law which defines the qualifications of the different classes of voters who present themselves at the polls?

A. I am, frequently.

Question by the same. Did much inquiry of that sort occur during that election?

A. There did, and much time was consumed in examining the qualifications of electors, and in administering the oath, required by the law, to those voters whose votes were challenged.

Question by the same. Was there any other contested election on that day than that between Mr. Newton and myself?

A. There was, for a Senator, which also retarded the election.

JOHN E. HOLT.

Sworn to and subscribed before us, at the time and place in the caption to these depositions mentioned.

G. B. COOKE,	} Commissioners.
W. W. SHARP,	
ALBERT ALLMAND,	

Hugh Blair Grigsby was next duly sworn by Giles B. Cooke, one of the commissioners, and an alderman of this borough.



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Testimony con-  
tinued.  
H. B. Grigsby,  
witness.

Question by Mr. Loyall. Were you a candidate for the State Legislature, and did you appear as such at the last April election in the borough of Norfolk?

A. Yes.

Q. by the same. At what hour were the polls opened on the first day of that election?

A. Between the hours of 1 and 2.

Q. by the same. Was that the usual hour of opening the polls in the borough of Norfolk?

A. No, 10 is the usual hour.

Q. by the same. What delayed the opening of the polls until between 1 and 2 o'clock?

A. The speeches made by the several candidates; I think there were as many as seven.

Q. by the same. Who addressed the electors first, Mr. Newton or myself?

A. Mr. Newton.

Q. by the same. Did it appear to you that it was incumbent on me to reply to him?

A. It did.

Q. by the same. From the whole course of the election on the first day, as well as from what transpired at sunset, being the close of that day's poll, were you of opinion that the law required the officer conducting the election to keep the polls open beyond that day?

A. Such was my opinion. From my observation, it was not practicable for the officer conducting the election to poll the votes of all the electors, who appeared for the purpose of voting, before sunset of the first day.

HUGH B. GRIGSBY.

Sworn to and subscribed before us, at the time and place in the caption to these depositions mentioned.

G. B. COOKE,  
W. W. SHARP,  
ALBERT ALLMAND, } Commissioners.

COURT HOUSE OF NORFOLK BOROUGH,

Friday, October 2, 1829.

Giles B. Cooke, Albert Allmand, and Walter F. Jones, three of the commissioners, met pursuant to adjournment, and proceeded to take the testimony of the witnesses whose depositions follow hereafter.

John E. Holt, being first duly sworn, deposed as follows:

Question by George Loyall. For how many years have you, as mayor of this borough, conducted the elections for member of Congress and Delegates to the General Assembly?

A. For many years; the number I do not recollect.

Question by the same. Have you a distinct recollection of the two contests for a seat in the State Legislature be-

tween Mr. Steed and myself, in the years 1825 and 1836? 1830.  
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If you have, say whether any application was made, on either of those occasions, to keep the polls open beyond the first day.

A. I remember perfectly well the two contests alluded to, but do not exactly remember in what years they took place. I have no recollection of any such application having been made to me, and am very confident that none such was made.

Question by the same. Were you the officer who conducted the polls at those two elections?

A. I was.

JOHN E. HOLT.

The foregoing deposition was taken before us, and subscribed in our presence.

G. B. COOKE,  
ALBERT ALLMAND, } *Commissioners.*  
WALT. F. JONES,

This case was under discussion several days in Committee of the Whole.

On the 6th of March, Mr. P. P. BARBOUR reported the resolution contained in the report, to the House.

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The House resumed the consideration of the said report; whereupon,

A motion was made by Mr. TUST, "that the said report be recommitted to the Committee of Elections, with instructions to report to the House the names of the voters which they find illegal, with a summary of the evidence upon which they found their decision."

And, after debate,

The previous question was called for, and sustained; and, on the main question, "Will the House concur with the Committee of the Whole House in their agreement to the resolution contained in the report of the Committee of Elections?" it passed in the affirmative; Yeas, 97; Nays, 84.

And Mr. Loyall took his seat the next day.

Petitioner admitted to his seat.

In the discussion of this case, the following speeches, delivered in the House, were reported in the newspapers, and are here inserted:

Mr. LOYALL said, though the situation in which he found himself placed was not a little embarrassing, no consideration, merely personal, should deter him from the discharge of an obligation he was under to those in whose behalf he had preferred the claim upon which the House would now decide.

Speech of Mr. Loyall on the resolution of the committee.

After a most patient and laborious examination of all the testimony in the case, your committee have submitted their

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Speech of Mr.  
Loyall, conti-  
nued.

report; and it is no part of the duty which has constrained me to appear before you, sir, to review the voluminous documents upon which that report is founded. My purpose is simply to ask your attention, very briefly, to certain preliminary points, relied upon by the sitting member as material, in coming to a just result. It is objected, in the first place, that the officer duly appointed to hold the election in the borough of Norfolk, did, in violation of the law, continue the poll over beyond the first day of the said election. I beg leave here to read such parts of the statutes of Virginia as relate to the matter: "An act for arranging the counties of this commonwealth into districts to choose Representatives to Congress," provides, sec. 1st, "that the counties of this commonwealth, and the *cities and boroughs* entitled to representation, shall be divided into twenty-three districts, in the manner following," &c. Sec. 2d. "That the persons qualified by law to vote for members of the House of Delegates in each county, city, and borough, composing a district, shall assemble at their respective court-houses, or other places," &c. Sec. 3d. "The person authorized by law to hold elections for members of the General Assembly in each county, city, and borough, shall conduct the said election, at which no determination shall be had by view, but each person qualified to vote shall fairly and publicly poll, and the name of the voter shall be duly entered, under the name of the person voted for, in proper poll books to be provided by the officer conducting the election;" and, after directing that writers shall be appointed to take the poll, it proceeds, "*like proclamation and proceedings shall be had for conducting, continuing, and closing the poll in each county of a district*, as is prescribed by law in the election of members to the General Assembly; and proclamation shall also be made at the court-house door, or place of holding such election of the person having the greatest number of votes on the polls on the closing thereof. Each elector shall be entitled to the same privilege from arrest, and be subject to the like *penalty and forfeiture for failing to attend and vote* at such election as is prescribed in the case of elections of members to the General Assembly. In order to discover and punish such failure to attend and vote, the sheriff, or other officer conducting the poll, the clerk of the county or corporation court, and the presiding magistrate, shall severally perform the same duty in relation to elections under this act, and be subject to the same penalty for neglect thereof, as is prescribed for them respectively, in relation to members of the General Assembly, by the sixth section of the act passed the 20th of December, 1785, entitled "An act concerning the election of members of the General Assembly." The county and corporation courts shall have the same power to remit fines hereby imposed on freeholders for failing to attend and vote, as they have, by law, to

remit fines imposed on freeholders for failing to attend and vote at elections for members of the General Assembly." Sec. 4th. "If the mayor of any city or borough entitled to representation in the General Assembly, shall, by death or any other cause whatever, be unable to attend and conduct the election for a Representative in Congress according to the provisions of this act, then the recorder, or if there be no recorder, or he be unable to attend, the senior alderman, capable of attending, shall attend and conduct such election according to law." The next is "an act reducing into one act the several acts concerning the election of members of the General Assembly," &c., by which the officer authorized to hold elections for members of Congress in each county, city, and borough, is required to conduct the poll in said elections; and which provides, sec. 15, "No elector shall be admitted to poll a second time, at one and the same election, although at the first time he shall have given but a single vote. If the electors who appear, be so numerous that they cannot all be polled before sunsetting, or if, by rain or rise of watercourses, many of the electors may have been hindered from attending, the sheriff, or under-sheriff, may and shall, by request of any one or more of the candidates, or their agents, adjourn the proceeding on the poll until the next day, and so from day to day for four days, (Sundays excluded,) if the same cause continue; giving public notice thereof, by proclamation, at the door of the court-house, or other place of holding such election; and shall, on the last day of the election, conclude the poll, according to the directions aforesaid; but if the poll, to be held at any such election, is not closed on the first day, the same shall be kept open two days thereafter at least."

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Loyall, conti-  
nued.

Whoever will examine attentively these several provisions, and every other provision of the election laws of Virginia, cannot fail, I think, to find warrant sufficient for the power exercised by the mayor of Norfolk borough, in continuing the poll over. As to which, until this case presented itself, I did not imagine a question could arise; and the question is made here, in default of the words "or mayor" after the word sheriff, in the last provision to which I have referred. In regard to every other power conferred, and all other duties imposed upon sheriffs, and other officers conducting elections in counties, like powers are conferred, and like duties are imposed upon officers conducting elections in cities and boroughs. Yet this power of adjourning the poll over, perhaps the most important of all, is to be withheld from the latter, because of the omission of two words in a solitary, isolated provision, completely supplied as they are by the context, the obvious import, and whole spirit of *all* the legislative enactments upon the subject. Is this, sir, to be construed differently from all other *remedial* statutes? The Legislature intended here to provide against a probable

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mischief. The sheriff of a county is clearly in possession of the requisite power, which, strange to say, is denied to the mayor of a city or borough, when precisely the *same mischief which the law was enacted to cure, must inevitably result for want of the remedy*. If, indeed, as is gravely maintained in one of the papers before me, no power whatever is bestowed by the election laws of Virginia upon the mayor of a corporation, and the only ministerial offices he can discharge are those of holding the election, and granting certificate, and holding the election be taken in the strict technical sense contended for, then this officer sinks into a mere automaton. He is utterly incapable of giving effect to the popular voice in elections; of upholding, by any efficient act of authority, the most dear and noble privilege known to the constitution and laws. Will you, can you, sir, consider him thus impotent, in the discharge of this high function? He is required by the law, made for his guide and government, to conduct the election; and as the election cannot be conducted without proclamation, and other proceedings, (which proclamation and proceedings, under the construction set up, must apply to a county only, the words "city or borough" being omitted after the word county, as you perceive in the third section of the congressional district law just read, as the word mayor is omitted after the word sheriff, in the provision relied upon,) conducting the election, and such proceedings as are necessary to its legitimate consummation, I maintain, were plainly intended to extend as well to the mayor of a city or borough, as to the sheriff of a county, to invest both with *similar and equal powers to the same end and purpose*.

The statute to which I first asked your attention, is, by its *title*, "an act for arranging the *counties* of this commonwealth into districts to choose Representatives to Congress." Then follows sec. 1st. Be it enacted by the General Assembly, that the counties of this commonwealth, and the *cities and boroughs* entitled to representation, shall be divided into twenty-three districts in the manner following, &c. Sec. 2d. And be it further enacted, that the persons qualified by law to vote for members to the House of Delegates, in each county, *city, and borough*, composing a district, shall assemble at their respective court-houses, or other place, &c., and then and there vote for some discreet and proper person, qualified according to the constitution of the United States, as a member of the House of Representatives, &c. Although ample provision is made, by this act, for conducting the election in each county, city, and borough, it would seem, from its title, not to extend to the latter, because of their omission (inadvertently, no doubt) after county. Again, a *casus omissus*, strongly analogous to that in question, is found in the first section of the act itself, which gives authority to adjourn the polls over. After prescribing

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tinued.

when the returning officers, conducting elections of Senators, shall meet to compare the polls, it concludes with this proviso: "That if, from high waters or other unavoidable accident, any sheriff or sheriffs may be prevented from attending at the times and places aforesaid, the other sheriffs shall adjourn from day to day until the business could be completed." Not a word is said about the *mayor*. Yet who will contend that if, from unavoidable accident, the mayor or other officer holding the election in any city or borough composing part of a district, should be prevented from attending at the time and place prescribed to compare the polls, the sheriffs assembled would not have power to adjourn from day to day in like manner? As these statutes are in the hands of every member of the committee, it is unnecessary that I should refer particularly to the various provisions in support of the position for which I contend. A careful examination of them will show most clearly the legislative intention in relation to this disputed power. Each and every part of the congressional district law, and general law of elections, the whole scope and language of both, establish, I think, beyond a reasonable doubt, that the power may be exercised as well by the *mayor as by the sheriff*. Besides the several provisions I have recited, "the time and place of meeting of officers to compare the polls; form of certificate of election; delivery of poll books to clerks; penalty for neglect of duty in comparing the polls; *penalty for refusing to take the poll when required by a candidate or elector, &c.*; penalties for refusing to act in certain cases;" for which, see sections 5, 9, 11, and 12 of the congressional district law, and sections 16, 17, and 28 of the general law of elections. All concur to prove that the powers bestowed, and duties imposed upon officers appointed to conduct elections in counties, and cities, and boroughs, are commensurate and equal.

But, sir, if further illustration be required, look at the enactments of Virginia, relating to this matter of adjourning the proceeding on the poll, framed for the government of officers in *other* elections. In the "act providing for the appointment of electors to choose a President and Vice President of the United States," sec. 2, we find this provision: "If it shall appear to the said commissioners that the persons entitled to vote were prevented from attending by bad weather, or from any other cause, they are hereby empowered and required to keep the poll open for a term not exceeding three days." No distinction is here made between a county and borough. The commissioners holding the election in either are charged with like powers, and are required to do the same acts; in both they are authorized to *keep the poll open*, should they see cause. To suppose, therefore, that this power of adjourning the proceeding on the poll was not intended to be conferred on the mayor of a



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city or borough entitled to representation in elections for members of the State Legislature, and of the House of Representatives of the United States, when the most ample power is given for this purpose by the act appointing electors to choose a President and Vice President of the United States, involves the Legislature in the strange anomalous fatuity of having left this vital privilege without adequate provisions for its free and full exercise in the one case, whilst, to preserve it unimpaired in the other, the utmost caution has been observed. And will it be considered less important that the people, the original controlling source of legislation, should be secure and unrestrained in this invaluable right, when exercised in the choice of those charged with their best and dearest interests, their *immediate* representatives here assembled, than in the election of *intermediate* agents, to choose a President and Vice President of the United States? In further confirmation that the power to adjourn the proceeding on the poll is never withheld from the officers appointed to conduct elections, whether in cities, boroughs, or in counties, the Legislature of Virginia, recently in session, enacted a law providing the manner in which the polls should be kept, upon the question of adopting or rejecting the constitution recommended to the people by the late convention, which contains the provision just read in almost *totidem verbis*.

It is alleged, however, that if the mayor of Norfolk borough does possess the power to adjourn the proceeding on the poll, neither of the causes specified in the act of Assembly occurred on this occasion to justify its exercise. Whether any one of the causes within the view and meaning of the act did or did not occur to legalize the proceeding complained of, rests upon testimony before you, and which, I trust, every member will examine for himself. But, sir, admit, for a moment, that a reasonable doubt may exist as to the rightful authority of this officer, under any circumstances, to adjourn the poll over, or, if the power be granted, still that it may fairly be questioned whether any one of the causes specified were to justify its exercise in the present case! Take it as a question *in foro conscientiae*. To what end was the power used? To enlarge and support the elective franchise: when the *refusal* to exercise it must have excluded from the poll a large portion of the vote of Norfolk borough. The testimony adduced to sustain the authority exercised in keeping the poll open beyond the first day is that of the officer himself who conducted the election, detailing minutely and clearly all the incidents; and his testimony is confirmed by the depositions of other persons high in public confidence, and who, as candidates for the suffrages of the people—being present during the whole scene—were enabled to speak, from a perfect knowledge of what occurred. A dispassionate examination of

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all the evidence cannot fail, I think, sir, to satisfy every one, that closing the poll on the first day would have amounted to an open, unqualified denial of the right of suffrage to a large portion of the voters of Norfolk borough in this election. The poll itself shows that a considerable number had not voted on the first day, and the depositions referred to of persons, I repeat, most competent, as well from official responsibility as from the positions they occupied, to speak of every circumstance, and to give to every circumstance its appropriate and just weight, prove *that time was not allowed to poll them*. It will be seen that, in the words of the law, "they were so numerous they could not all be polled before sunsetting;" and the officer who conducted the election did not hesitate, therefore, in exercising the power conferred upon him by a wise and salutary enactment, to avert the palpable and crying mischief that must otherwise have ensued. It should be recollected that it was not an election for a Representative to this House only. In obedience to law, an election was held at the same time for Senator and Delegate to the State Legislature. Polls were, accordingly, opened for six candidates; and when, in connexion with the time consumed in entering the names in the poll books, and, still more, in settling the right of disputed votes, to which, from the peculiar character of the chartered qualifications, and the number of challenges the face of the poll exhibits, no small space was devoted—when, I say, in connexion with all these things, a calm and deliberate consideration is bestowed on other facts touching this point, disclosed in the depositions, it must be perfectly obvious that the mayor had but the alternative to adjourn the poll over, or of putting an absolute interdict on the elective franchise. Indeed, but little attention to all the circumstances of the case must, I am persuaded, produce conviction in the mind of every member of this committee, that it was both morally and physically impossible for any human being (the vote being *viva voce*) to have taken the whole poll, from the time the voting commenced to "sunsetting." And I appeal with confidence to the testimony, which speaks plainly as to the causes that prevented the officer from opening the poll at an earlier hour. It marks, most strongly, my solicitude on the subject, and the part taken by either candidate for a seat in this House, in producing the delay, which the mayor could not have controlled, without subjecting himself to the highest censure, if not merited execration, of the sitting member, who now charges him with a gross abuse of the responsible trust confided to him—a usurpation reprobated by every dictate of justice, and every principle of honor. It is not for me, sir, to defend the officer against this offensive charge. In what manner, or how far, it is sustained by the evidence, the House will determine.

But, sir, you are referred to the contested election of Bas-

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Bassett and Bayley. In one of the documents upon your table, the sitting member says that "it is a remarkably strange case in support of his objections;" yet, after this round assertion, all that he has thought fit to let you know about it, is, that "the county of Accomac is one of the largest in the State of Virginia." This *important* fact I will not dispute; but take leave to extend your view a little further, by reading that part of the report of the committee in the case, which relates to the point in question, viz. "It did not appear, nor was it pretended, that any rain had fallen, or that any rise of waters had taken place. The only question was, whether the other condition had happened on which the law authorized a continuance of the poll beyond the first day, with the effect of such continuance. It was proved that the election *commenced early and progressed rapidly*, and with no intermissions, except such as appeared necessary in determining the right of disputed votes, and a *small space* occupied by a friend of the petitioner, in addressing the people. That, toward the close of the day, voters became more rare, and, for half an hour previous to sunsetting, very few, if any, votes were given, insomuch that the sheriff proclaimed several times at the door of the court-house, that, unless other voters would come forward, the election would be closed. That about sunsetting four persons appeared, and demanded the privilege to vote; two of these were *deputies of the sheriff*, who were present during the day, assisting in the election; it did not appear whether the remaining two had been present during the day, or had just appeared at that late moment. The sheriff continued the election over to the second day, at the request of the agent of the sitting member, though objected to at the time by the agent of the petitioner, as unauthorized and illegal. From this, your committee were very clearly of the opinion that the event did not happen on which rested the authority of the sheriff to adjourn over the election; that the question whether more persons had appeared than could be polled on the first day, was a mere question of fact, allowing no discretion whatever in the officer, and that the subsequent proceedings were illegal, and that the votes received on the second and third days ought to be rejected. It appears that 53 votes were given on those days for the sitting member, and 4 votes for the petitioner."

If, Mr. Chairman, upon a full examination of any one or more cases which had been decided by the House of Representatives, they should be found to militate against any principle of law or right, they would not be considered as binding authority upon you, but, as in all other cases, even before judicial tribunals, be overruled. I am disposed, however, to contest no one point decided in the case of Bassett and Bayley. Every word of the report in that case, which has any relation to this, has been read. In that case the question as to the

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authority of the officer to adjourn over the poll, was a mere question of fact, and it appeared most clearly from the evidence that the event upon which rested his authority *did not happen*; there it was proved that the election *commenced early and progressed rapidly, &c.* In this case it is proved the testimony of the sitting member itself proves that the election *did not commence till a late hour of the day*; the depositions of the officer conducting the election and others prove that the poll could not have been opened at an earlier period without a wanton departure from a usage which prevails throughout Virginia, of allowing the candidates first, should they be so disposed, to address the people; that the sitting member, availing himself of this privilege, made it incumbent on me to reply; that the election progressed with but little intermission, except such as was necessary in determining the right of disputed votes, till sunsetting, when, in consequence of the appearance of voters demanding the exercise of their right, the poll was adjourned over. It cannot be denied that here all the material facts vary from the case of Bassett and Bayley. The first event upon which rests the authority of the officer, as alleged in that case, was distinctly proved *not to have happened*; in this the evidence conclusively establishes that *it did occur*. The case of Bassett and Bayley then, instead of supplying any principle or feature adverse, comes strongly in support of the authority exercised by the mayor of Norfolk; for who can doubt, from the view presented by the report of the committee, if in that case it had been proved, as I affirm it is, beyond all question, in this, that the votes could not all have been polled before sunsetting on the first day; that the decision of the House in the former would have legalized the proceeding on the poll *until the next day*?

This, sir, was a most ardent contest. Having passed through four counties, it reached Norfolk borough, where it was obvious the friends of both candidates would come with their whole strength to the polls. A full election was demanded, as well from the deep interest with which all were looking to the result, as from the fact that here it must be determined. Was one entire ordinary election day then too much for the people on such an occasion? And be it remembered that whilst the interest of the sitting member could not suffer by stifling the popular voice *at this pinch of the contest*, the other side had an interest equally strong in removing every obstruction, consistently with the laws of the land, to a fair and full expression of that voice. Was one entire day, I ask again, sir, *from the hour, I mean, at which elections usually commence, to sunsetting*, too long for the voters in such an election as this? And here permit me to notice a remark made by the sitting member in one of these papers. "I have known instances," he says, "and they have not been unfrequent, when the candidates being dis-

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posed to make long speeches and waste time, the people came forward and demanded that the poll should be opened, and compelled the sheriff to open it and take their votes." In reply to this, I would inquire, who manifested a disposition to make long speeches on this occasion? The gentleman himself, who, until the contest was brought to this point, I do him the justice to say had not wasted much time in that way, here boldly challenged a discussion, which contributed, in no small degree, to the delay in opening the poll. Instead of the usual hour, ten, the voting did not commence till between one and two: and looking to the peculiar nature of the suffrage qualifications in this borough; the keen vigilance exercised by the contending parties over the poll, not unfrequently consuming from five to ten minutes in deciding the right of a single vote, can it be said that reasonable time was allowed? that it was even *practicable* to take the whole poll on the first day, or that the mayor, in adjourning it over, is really obnoxious to the charge of partiality and usurpation? You are told that the voters had a right to demand that the poll should be opened to receive their votes. Be it so. What evidence have you that the demand was not made? And if not made, by what exercise of authority, by what sort of management, could the officer have contrived to record the votes of those who alone had a right to give them before the discussion terminated? The discussion (commenced, so far as this election was concerned, by the sitting member) no one can doubt delayed the opening of the poll, and the argument which denies the power to adjourn it over would lose no force, if a double portion of time had been consumed by the speeches. In such case, who so hardy as to maintain that the contingency, for which the law has provided, would not infallibly occur? It clearly occurred in *the present case*. The depositions conclusively prove that the poll was not opened till nearly four hours of a customary election day had expired; and that from this, combined with other causes, the voters were "too numerous to be polled before sunseting." The act will show that, as the poll was not closed on the first day, it required "to be kept open two days thereafter at least." But the testimony produced in support of these facts, fortified as you will find it, must yield to certain facts and remarks contained in a paper marked A. This paper, you are gravely told by the sitting member, "shows clearly that not one of the causes specified in the law occurred, to justify the officer in keeping the poll open beyond the first day's election. Yet, strange as it may appear, this said paper, which, from the tone of imposing authority in which it is announced, you might conclude would put this matter to rest, is nothing more nor less than a protest, spread upon the list of votes taken for me in the borough of Norfolk, and objected to by the sitting member; a protest setting forth facts which do not even pretend to carry with



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them a shadow of proof, and remarks advancing, if any, certainly the smallest possible claim to argument. I say this without intending any sort of offence to the member, but meaning to state what is literally true. If I have deceived myself, however, and there really be in this paper, marked A, some magical incantation, or mysterious power eluding my comprehension, which settles the point in question, then, sir, instead of coming here, as I supposed I had, to support the people's right, I deserve your scorn for my folly, and the sooner you dismiss me from your presence the better.

To sustain this leading objection presented in the document before me, it is said that "prior to the last election, on the 27th day of April, 1829, there is not a solitary instance of any mayor having ever ventured to exercise such a power; and even the present mayor, on or about two years prior to the last election, in a warmly contested election between the petitioner, Mr. Loyall, and Mr. Steed, on an application made by Mr. Steed to continue the poll over to the succeeding day, refused to do so." In reply to this, I am justified in saying, that if the sitting member has not been misinformed as to what occurred in the election referred to, he has altogether misconceived what is here established. I aver, with perfect confidence, that, *as far as the testimony exhibited goes*, the facts stated as to what did occur are not proved, but disproved, the officer who conducted that election declaring that he had no recollection that any such application was made to him, and his confidence that none such was made; and a solitary witness, examined in behalf of the sitting member, stating that he had "heard the thing mentioned by several, but he could not recollect who they were." I notice this with the view to set the members right as to a fact alleged to be established by the depositions; and not from a belief that such application, if clearly proved to have been made and refused at a preceding election, would furnish the slightest support to the position he has assumed; unless, indeed, it showed an application made and decided upon the ground that the law gave no discretion *that the mayor could, under no circumstances, continue the poll over*.

It is objected, secondly, that the depositions taken on my behalf are illegal, and therefore ought not to be "read as evidence." I am unwilling, Mr. Chairman, to take up the time of the committee in following out the course of reasoning urged in support of this objection, as a moment's consideration will enable every one to ascertain the weight due to it. This testimony should be rejected because it was taken according to the form prescribed by law "concerning disputed elections of members of the General Assembly of Virginia." Mark, sir, there is no act of Congress in force prescribing the mode of taking depositions in contested elections; but the constitution of the United States provides that "the electors in each State of members to this House



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shall have the qualifications requisite for electors in the most numerous branch of the State Legislature." The mode then prescribed by the laws of the several States (where laws exist on the subject) for ascertaining the qualifications of electors, or, in other words, of determining the right of voters in disputed elections, if not the only, must unquestionably be the best mode of establishing *like* qualifications, and determining the *same* rights in a contest for a seat here. If this objection, however, could derive any aid whatever from the allegation that the act applies exclusively to a contest for a seat in the Legislature of Virginia, some contamination must first appear to have resulted from the simple act of appointing these commissioners, before such appointment can be made to impair, in the smallest degree, the evidence taken before them; for, as justices of the peace and notaries public, (for the borough of Norfolk and county of Nansemond,) they were fully authorized by the laws of the State to administer oaths, and in that character, and possessing that power, come up to the full measure of competency demanded by the argument urged in support of the objection. But it is sufficient that the testimony exhibited on my behalf is the only evidence admissible before the Legislature of Virginia in a contested election; the qualifications requisite in electors of members to either branch there and to this body being precisely the same. The evidence produced on behalf of the sitting member would not be received in the Legislature of Virginia in determining the qualifications of the electors of the most numerous branch. And I have always believed that whensoever a doubt or difficulty arose in any investigation carried on by the Committee of Elections of this House, the settled practice and decisions of the State Legislatures upon the point, whether as to principle or form of proceeding, were regarded as high authority, if not conclusive; in cases, I mean, where, as in this, no express regulation of Congress exists in relation to the matter. Upon this ground alone I should be content to rest the validity of the testimony. Yet, sir, it will be recollected that I have raised no objection to the mode adopted by the sitting member in taking his evidence; and whilst he protests so vehemently against the proceeding indicated in the law as my guide, is it not a little remarkable that, after having received from me, in due form, notice with lists of votes objected to on the several polls taken for him in the district, he should have moved *pari passu*, in returning similar lists of votes on the polls taken for me precisely in the form, and within the time prescribed by this very act, the authority of which he repudiates? This is attested by the documents, but it will not be denied. For what measure, I would ask, was this done, but the convenience of the thing; the convenience if not positive necessity of following some rule? And in the absence of any regulation of Congress on the subject, it

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could not escape the attention of the member that the mode of proceeding marked out in his own State law for attaining the same end was, to say the least of it, safe and good. The documents will further show that, after this first step, the departure by the sitting member himself from this good and safe mode of proceeding, led to all the inconvenience experienced in subsequent stages of the contest. The act of the Virginia Assembly provides that, in a contested election, the petitioner and the returned member shall respectively begin to take their depositions within two months after such election. This every one will admit is right; there is an obvious propriety in it. Accordingly, on due notice, I commenced within two months. The sitting member did not commence till nearly four months had expired. Now, as there was no established rule of proceeding, coercive upon him, (and I concede that none existed, contending for nothing more than that no injury could possibly result; but, on the contrary, much good, from the course which I pursued,) was he not, upon his own hypothesis, upon the broad principle of what is due between man and man, bound to act with diligence? If both parties, in such case, are not held to proceed within a reasonable time, (which any law it might be the pleasure of Congress to enact upon the subject would certainly prescribe,) then contesting a seat here is an idle mockery; for he who once gets possession of it, may fold his arms in perfect security; may retain it by procrastination indefinitely, not only without having obtained a majority of legal votes in the election, but in open, continued, and wanton defiance of the electoral body. I advert to this, sir, not in a spirit of complaint, but simply as showing that the moment the sitting member left the plain onward path before him, he found himself bewildered, and in no little danger of losing his way. Have we not evidence of this in one of the papers annexed to this report? He then says that "many are fully satisfied that the petitioner had more bad votes on his poll in the borough of Norfolk, than his majority over me there. He could not object, on my poll in the borough, to more than 27 votes; his not objecting to a larger number, if he could, is not owing to forbearance; nineteen-twentieths of which are good votes. On his poll in the borough, I objected to 166. I believe I am entitled to a majority of legal votes in the borough, and a further examination of the poll would prove it." This sweeping charge of perjury against more than 100 voters on the poll taken for me in Norfolk borough, it is modestly intimated by the sitting member, would be sustained, *if he only had more time*, notwithstanding seven months had elapsed from the close of the election to the meeting of Congress; and this perjured list, during that interim, was submitted, as you cannot fail to perceive, to the most close and searching examination. The indirect application here made for further time is, I think, conclusive to show one of two.

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things; either a discovery of some fatal error in the course he has pursued, or a conviction in the mind of the gentleman that his depositions, taken according to the most approved form, have failed to make out his case. Does not this single suggestion, sir, go very far to admit the justice of the claim I am asserting upon the evidence produced, and give additional weight to the report of your committee? And here I beg leave to remark, that the land books were not only referred to in taking my depositions, as the sitting member has informed you they were in taking his, but copies of these books, duly attested, from the largest county of the district, were laid before the committee, in order to a more thorough and satisfactory examination of the case. To what degree of respect they are entitled, I leave others from the State to say. Their production though, (whatever authority is due to them,) did not prevent the committee from letting in other testimony, the full benefit of which the sitting member has received, as the documents amply prove. The land books were exhibited, on my part, to corroborate the testimony, and to show, moreover, the *quo animo*, I was about to say; but I am aware there are those who will not be disposed to allow me credit for the spirit and intention under which I acted. I have a perfect right to say, however, that these books were introduced to show the *solid ground upon which I entered into this contest*.

The third point made by the sitting member, as to the citizenship of certain voters on the poll taken for me in the Norfolk borough, I shall notice no further than to call the attention of the committee to the character of the evidence, by which he has supported his own votes, objected to upon the same ground. He would require of me strict record evidence to prove the naturalization of an alien, whilst a glance at the depositions will satisfy you that the oath of the party against whom the objection had been made, was regarded, in his own behalf, as sufficient to establish the vote; and this objection is made, too, by the sitting member, with a full knowledge that the freehold qualifications of no small number of his voters, in the several counties of the district, rest upon mere parol evidence. To which of the two, if to either, the strict rules of evidence should apply, I submit to the judgment of this committee.

There are many gratuitous remarks, occupying no small space in the papers before me, some of which it is proper that I should notice. The sitting member tells you in one of them that "the petitioner has expressed his confidence that he has a majority of legal votes over me. He may endeavor to give all the importance he pleases to such declarations," &c. I did, sir, express my confidence that the *evidence* submitted (and upon which the question will be decided) would show that I had obtained a majority of legal votes in the election; but I certainly did not endeavor to give more importance to the declaration than an honest conviction of

its truth fairly demanded. The result of the examination by your committee confirms, in some degree at least, the correctness of the opinion I ventured to express; and it proves, moreover, that the mode of proceeding I adopted has not been altogether so defective as the gentleman imagined. You are again told that "the petitioner says, depositions taken before respectable persons, whether according to form or not, should be read." It is due to truth, sir, that I should protest against the accusation of having said any such thing. What I said was, (and undeniable proof of it is at hand, though it may not be in order to refer to it particularly,) that I would not have objected to the sitting member's depositions, whether according to form or not, believing they had been taken before men of probity and good repute. This is precisely what I did say, in substance. I now go further, and declare that if there had been an express act of Congress prescribing the mode of taking depositions in contested elections, and the sitting member had deviated from that mode, unattended by any circumstance calculated to excite suspicion of foul play, I would not have objected to the evidence. I would not have objected to it upon the principle "*Honestum non est semper quod licet.*" Upon this principle I shall ever act, though I am aware that perfectly upright men have their own opinions on these matters, and may honestly differ about them.

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I had intended to confine myself, almost exclusively, to the first point of objection made by the sitting member, that, I apprehend, being the only one entitled to much consideration in the decision of this question. I trust, sir, I have not trespassed upon the patience of the committee; though I am very sensible of the lame manner in which I have presented these remarks. With full confidence that the result will be in accordance with strict justice, and preserve the integrity of the elective franchise, that bulwark of our free institutions, and best guaranty of our liberty, I beg to make my acknowledgments to the committee for their kind attention.

Mr. PEARCE said he did not intend fully to discuss all the questions which have grown out of the resolution reported by the Committee of Elections, and have been presented to us for our consideration. Should we settle, said Mr. P., one question different from the committee; we are told by them, notwithstanding all their decisions in regard to others, that would entitle the sitting member to his seat, and supersede the necessity of a further discussion. I allude to the right of the mayor to adjourn the meeting, and the legality of the votes given on the second day of the election in the borough of Norfolk. If the right did not exist, and the votes polled the second day were illegal, the sitting member has a majority of the votes polled in the congressional district, and it would now be a useless consumption of time to extend our inquiries or investigations further. Before I examine

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the conduct of the mayor, and the legality of his course, I have a few words to say to the committee who reported this resolution, and I beg leave to assure them that, as men, and as members of this House, I have a high regard for them, but it will not be inconsistent with that regard to speak of their report as I think I am warranted in speaking. They seem to have thought their report was made for their sole and exclusive use and benefit, and not for the benefit of the members of this House; that they have received evidence enough to satisfy them, or a majority of them, (but from what source I cannot tell,) that their report ought to be sustained, I am not disposed to question. But they ought to have recollected that we are the triers, and would be pleased to have such evidence as would bring us to a correct conclusion; that the testimony which was conclusive upon them, might not be with us; hence the necessity of a report of the evidence that was laid before them. I do not agree that it is the right or prerogative of the committee to form opinions for the members of this House. It was their duty to collect the testimony, and report that, with such facts as came to their knowledge from the investigation, to this House, that we may judge of them, and, consequently, adopt or reject their report. But, sir, what mortal man, from their report, and the documents they have submitted, can tell by what evidence they were influenced? Out of mere grace, they have told us they have received illegal testimony, illegal, I say, because they have received parol testimony to prove a man's title to real estate; and if testimony of this description had not been admitted, the sitting member, Mr. Newton, would not have been so well off; in other words, the majority against him would have been greater than the one reported. For this admission, he must acknowledge a great share of indebtedness to the committee. I would ask what right the committee had to dispense with the strict rules of law. If they could do it in one case, they could do it in another; and if they have not done this, I think I shall be able to show they have evidently misconstrued the law. A moment's indulgence, Mr. Chairman, while I call the attention of members to a part of this report. They say, in an examination of the testimony, they acted upon the following rules, heretofore adopted by this House, in the case of Porterfield and McCoy:

1st. That all votes recorded on the poll lists should be good, unless impeached by evidence. 2d. That all votes not given in the county where the freehold lies, be rejected. 3d. That the votes of freeholders residing out of the district, but having competent freeholds within the district, be held legal; that, having examined the testimony upon these principles, (what testimony the committee have not condescended to inform us,) Mr. Loyall has sustained exceptions enough by him taken to Mr. Newton's votes, to entitle him



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to the seat now in dispute. Now, sir, I ask any gentleman for the evidence that is to govern us, or any reference to it. We are left in the dark, and must be satisfied with what the committee have said was sufficient to satisfy them, and that, too, without knowing what it was. If this is to follow, where is the necessity of any debate whatever? What the committee have said, must govern us; their will, their opinions, their convictions, must be our law. This may be correct, and I may be wrong in supposing it incorrect; but, until I am convinced, I shall take the liberty to question the infallibility of the committee, and shall not subscribe to the correctness of their course. [Here Mr. TUCKER interrupted Mr. P. and said if it would be of any service to him to have a list of the voters the committee believed were not entitled to vote, if Mr. P. will apply to him at any convenient time, he would procure a list for him or any other member.] Then, said Mr. P., it appears, by the gentleman's confession, that the report does not contain all the information that the committee thought might be desirable, and if the members of this House will call upon the gentleman at his lodgings, why, forsooth, he will furnish additional information; but bear in mind, Mr. Chairman, the call must be made at some convenient time, and the gentleman himself is to be the judge of the time when, as well as the convenience. This, then, Mr. Chairman, is a report in part, although we are called upon to act upon it now, and, as to the residue of it, we must for that call upon the gentleman at his lodgings.

Sir, I am much obliged to my friend from South Carolina for this intimation; and would be further gratified, if he would interrupt me again, by answering a question which I will now propound: The sitting member (Mr. Newton) objects to certain votes that were polled in the borough of Norfolk, by men who had never been naturalized; will the gentleman inform me what testimony the committee received of their naturalization? [Here Mr. TUCKER observed, that he was not to be catechised, or called upon to answer questions put in that way.] Mr. Chairman, having now made all the general observations which have been presented to my mind, and unwilling to detain the committee but for a few minutes more—in fact, I did not rise, said Mr. P., to discuss the question at length—I will proceed to make some remarks upon the right and power of the mayor of Norfolk borough to adjourn the town meeting, and open the polls on the second day. I hope I shall be indulged with a few remarks on this question, because the committee have informed us that on this, they were not unanimous; and because, if the second day's proceedings were illegal, the votes received on that day must be rejected. And admitting the course of the Committee of Elections, in relation to every other point raised, to be correct, still the sitting member is entitled to his seat.



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In discussing this question, said Mr. P., we are not required to reject the plain rules or dictates of common sense, or discard those principles which have governed men in the discussion of analogous questions. "There are," says a celebrated writer, "three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide a remedy; and what remedy the Parliament has provided to cure this mischief; and it is the business of judges so to construe the act, as to suppress the mischief, and advance the remedy. If the language of ancient charters has become obscure, from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to, for the purpose of explanation; even in the case of an act of Parliament, universal usage has been resorted to, as a proper expositor, when the language is doubtful—*optimus interpret rerum usus*."

These rules and maxims, coming from the sages of the law, and recognised by all men where the common law is in force, I intend to apply, in the further remarks I have to submit. In reference to the right exercised by the mayor of the borough, it is admitted to be one never before exercised by him, or any of his predecessors. It is not pretended that any of his predecessors ever thought they had the power to adjourn a meeting, and hold an election the second day. It is proved that the present mayor, but a few years ago, declared that he had not the power, and it is not pretended that since that period there have been any further legislative enactments upon the subject. It is not pretended that the mayors of the other boroughs, or cities, in the State, ever exercised this power, or thought they had a right to do this. Then, sir, this act of the mayor of the borough of Norfolk is not supported by usage, his own acts, the acts of his predecessors, or the acts of any of those filling similar places in the State—usage, practice, the acts of his predecessors, his own acts, and the acts of mayors in other boroughs and cities, are against him. From what then did he derive his authority to do at this late meeting what before he never thought he could do, nor any other man living? Sir, the Committee of Elections, to legalize his acts, have told us, in their report, that the mayor was authorized to adjourn the meeting, because one of the contingencies contemplated by the act of 1818 happened. What, then, sir, that act, made for the government of another officer, is to be taken as the rule of conduct of this! Yes, sir, the act to enlarge the powers of sheriffs presiding at elections in counties, is to be adopted by the mayor of Norfolk for his government. Sir, the Legislature of the State of Virginia never intended, by the act of 1818, to confer the same powers upon the mayors

of boroughs, or cities, as that act gives to sheriffs of counties when superintending elections.

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In the first place, if this had been so intended, they would have said so; but this, from the whole tenor of the act, it appears, they carefully avoided. In the second place, there was no reason or necessity for it. In the course of this discussion, the decision of this House in the case of Porterfield and McCoy has been referred to, and what was that? The sheriff of one of the counties of Virginia, previous to the act of 1818, did what the mayor in this case has done, and a committee of this House, and subsequently the House, declared the votes received on the second day were illegal votes, and they were rejected; if the mayor at that time had done what the sheriff did, our committee would say his acts were unwarrantable. If then the powers of the sheriff have been enlarged, and the powers of the mayor have *not* been increased, and there has been no legislation in reference to an increase of his powers, he must now, in reference to his acts, be viewed in the same light the acts of the sheriff were then viewed in. I ask gentlemen, if, previous to 1818, the sheriff of a county could adjourn an election, and open the polls on the second day. I presume I shall be answered, No, he could not. Then I ask gentlemen, if, at the late election in Norfolk, the mayor could do it. It appears to me that gentlemen in their candor must say, No, he could not. This is all I want to show, that the whole proceedings on the second day were illegal, and cannot be viewed by us in any other light. Sir, one moment, if you please, as to the cause and the necessity of further or greater powers, in the case of an election that the sheriff was to superintend, and the reasons assigned for it. Every city in Virginia is so made, that every man wishing to avail himself of the elective franchise, could do it without any great inconvenience to himself; but not so in reference to some of the large counties of Virginia. To attend a town meeting, he must ride thirty miles in one day; and it might so happen that a meeting was to be holden some day, when, from the roads (which in Virginia, from all I have ever seen, at all times are bad) being so bad, and the watercourses such, it would be impossible for him to ride or walk to the place where the meeting was to be holden. The necessity for an adjournment, then, existed in one case which did not exist in the other. But, sir, we are told by the committee, and the petitioner, that the construction of the law which they contend for is in favor of the elective franchise, and the rights of citizens. Sir, I contend that the law, as it now is, does not abridge any of these rights: that, on the first day's election, every man who wished to have exercised these rights, had an opportunity of doing it, and no law ought to bend to the convenience of any man, he being the judge of that inconvenience. The petitioner appears to have been

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aware of the objections which I have urged, and, to make out his case, is driven to the necessity of expunging from the statute of Virginia a few words, and *at will* supplying an ellipsis by adding a few others. This is taking a great and unusual liberty: one *small* word added or rejected, would give to any statute a very different reading. I think we must take every law as we find it, and, if its operation be bad, must refer gentlemen to the proper power for a remedy. John Horne Tooke once complained that he was indicted upon a preposition, and convicted, before Lord Mansfield, upon an adverb: and to prove that his lordship was in error, he wrote the Diversions of Purley. Every man would complain, and wish the law different, who thinks himself affected by it, as the common sense of mankind teaches them to construe it. In reference, then, Mr. Chairman, to the acts of the mayor, whether we consider the old law as every one acknowledges it was; whether we refer to the evil which existed in the large counties in Virginia, under the old law, or the remedy that was given by the act of 1818; whether we consider the usage that prevailed, and the analogous usage in other boroughs and cities in Virginia, or the former decisions of this House, or every principle of law that is applicable to such a case, I am forced to the conclusion that all the acts in connexion with the election, directed to be holden by the mayor on the second day of the meeting, were illegal; and every vote on that day received was an illegal vote, and by the committee ought to have been rejected.

Speech of Mr.  
Tucker, of S.  
C., in support  
of the report  
of the commit-  
tee.

Mr. TUCKER said I am extremely sorry to trouble the committee again on this subject, but the remarks just submitted by the gentleman from Rhode Island (Mr. PEARCE) imperiously call upon me to make a brief reply. I would ask, said Mr. T., what has been the progress of this case since the Committee of Elections reported it to the House? It has been this, said he: when the subject first came before the Committee of the Whole, the gentleman from New York (Mr. STORRS) made a motion for the committee to rise, with the express purpose, as he said, to follow it up by a motion in the House for the whole subject to be referred back to the Committee of Elections, with instructions to report the names of the voters who they believed were not entitled to vote, and also their reasons for rejecting each vote; and, as I understood him, he made some groundless and improper insinuations against the committee. But after some discussion in relation to the extraordinary, and I will say unprecedented proposition that he had made, he said that if the Committee of Elections would furnish him with a list of the names of the voters who they believed were not entitled to vote, or if they would have a list of their names laid on the table, he would withdraw his motion. The chairman of the committee consented to do it, and a list of their names was

laid on the table for the examination of any and every member of the House who thought fit to examine it. The committee did not do this because they believed it was their duty to do so, or that it was by any means necessary for the attainment of justice that it should be done, nor because they believed that any member of the House thought it would answer any such purpose, but they did it for the sole purpose of stopping all further discussion, and unnecessary consumption of time. The committee knew, and so ought every other member of the House to have known, that all the information pretended to be sought for had been substantially reported to the House by them. They knew that they had furnished the names of every voter that the petitioner and the sitting member have each of them alleged to be illegal votes, and also the number of the votes at each place of election that they had rejected as being illegal. They stated in their report the principle that they believed to be correct, and had adopted to decide on the legality or illegality of all the votes that each of the contending parties had alleged were illegal. They stated in their report the laws of Virginia, which the committee believed had a particular bearing on this case. They adopted the same principle in making their report that has been practised by former committees. In fact, said Mr. T., the Committee of Elections reported to the House every tittle of evidence of every description that they had in their possession, all of which was printed, except two commissioners' books, and every member of the House furnished with a copy. Their report is as full and explanatory, and as easy to be understood, as any report that ever has been made by any former Committee of Elections in similar cases. But, Mr. Chairman, after the Committee of Elections had done all this, the gentleman from Virginia (Mr. Newton) revived the same complaint against them. It is true he disclaimed all intention of insinuating any improper motives in the Committee of Elections, as well as the gentleman from Rhode Island. But, sir, he still contended that the whole subject ought to be referred back to the committee, with instructions to report the names of the voters who they believed were not entitled to vote, and also their reasons for rejecting each vote. After he had concluded his speech, I thought that I would try once more to stop all further discussion and unnecessary consumption of time by those gentlemen who seemed to be so much disposed to avoid meeting the question before them, and to decide upon it on its real merits, by endeavoring to attach blame to the Committee of Elections, rather than examine the laws and the evidence in relation to it; and, in order to accomplish that object, I told the gentleman from Virginia that if he or any other member of the House did not yet know the names of the voters that the Committee of Elections believed were not entitled to vote, that if they would

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apply to me at any convenient time, I would procure a list of their names, from which any gentleman who chose to do so might take a copy, and that I had no doubt but that any other member of the committee would do the same. But, sir, I find that all this will not do for them. I suppose, said Mr. T., that they believe their best chance, if not their only one, of success, is to attack the Committee of Elections in the manner they have done. The gentleman from Rhode Island (Mr. PEARCE) now tells you that the Committee of Elections have not given the House any information by which this committee and the House can judge whether the Committee of Elections have decided correctly or not. He says that they must give the names of the voters that they have rejected, and their reasons for rejecting each voter; and has called upon me to say if I believe that this committee and the House is bound to agree to the report of the Committee of Elections, because they believe that they are right. Mr. T. said, I answer, No—I say to the gentleman from Rhode Island, No, I do not, nor do the Committee of Elections, believe or ask any such thing. But, sir, I will tell the gentleman from Rhode Island what the Committee of Elections ask and what they expect, and that is, for him and every other member of the House to examine the laws and the evidence, and then to judge and determine for themselves. They have the laws and the whole of the evidence printed and before them that the Committee of Elections had before them. But, sir, if the member from Rhode Island believes it will be of any service to him to have a list of the names of the voters that the Committee of Elections believe were not entitled to vote, if he will apply to me at any convenient time, I will procure a list for him or for any other member; and if they wish to have it printed, and every member of the House furnished with a copy, and will make a motion in the House for that to be done, I am very sure that there is not one of the members of the Committee of Elections who will object to it.

The committee do not wish to conceal any thing whatever. They have not concealed or kept back aught. They have substantially reported all the information in relation to this case, that can be done. But, sir, if the member from Rhode Island, or any other member of the House, wants to know more than they do, or can plainly see in the report of the committee, about the reasons that the committee have, for rejecting each vote, if they will apply to me at any convenient time, I will give them all the information I possibly can, and I am very sure that every other member of the committee will cheerfully do the same. [Here Mr. PEARCE rose, and asked what were the reasons that the committee had for deciding as they did, on the six votes that were given to Mr. Loyall, which are alleged by Mr. Newton to be Irish aliens, and what part of the evidence is it that



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caused the committee to form that belief?] Mr. T. said, I will not give way for questions to be put to me to answer. I thought the gentleman wanted to explain; if that had been the case, I would cheerfully have given way for him, but not to propound questions for me to answer. However, as the gentleman has thought fit to ask the question at this time, I will tell him that this is not the proper time or place for him to ask, or me to answer such questions, and I will tell him more; I will tell the gentleman to examine the laws and the evidence, and the report of the committee; he has the whole of it before him, and there he will find all the substantial information that he has just called upon me to give him; and when he will do that, then, if he may choose to select one or two of the votes, or any other number that may suit him best, to object to, and make long speeches, and, in that way, endeavor to avoid a decision of the question on its real merits; then I will be security, said Mr. T., that some member or members of the Committee of Elections will endeavor to show that their reasons are sufficient to justify them in all that they have done; then they can make speeches, too; and not until then will it be necessary (in my opinion) for the committee to say more in that respect than they have done in their report. Sir, said Mr. T., I cannot see any earthly object that those gentlemen can have, but to fix a burden on the Committee of Elections, that they could not perform in months to come, and which would make a volume. No man can tell how long and protracted will be the discussion. So that either a decision on the merits of the case will never be had at all, or the committee, from the want of time necessary to make a lengthy and detailed statement of all their reasons in relation to each vote that they believe is legal, or illegal, will compel them to make a brief statement of but very few words, and then gentlemen will, by their ingenuity, criticise in long speeches, in relation to the reasons that the committee may give, and so confuse and embarrass the understanding, as in that way (if a decision is ever made at all) it would not be on the merits of the case, nor according to the laws and the evidence, but upon collateral points, sustained by ingenious criticism and lengthy speeches. I say, sir, that I cannot see any other object that those gentlemen can possibly have, but such as I have mentioned. I say, sir, that such a proposition as this never was made before, and I will defy the gentleman who makes it, to point out one single case, in the history of our country, where such a proposition as this has ever been made before. But, sir, said Mr. T., I said at first that I did not intend to enter into a discussion of the merits of this case at any time, and I say so yet. My object at first was, to try to prevail on gentlemen to examine the laws and the evidence, and then to make up their opinion, and decide for themselves, and that is my object and wish



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now; and I do most sincerely hope that gentlemen will do that, and complain no more of the Committee of Elections. The committee have done what they believe to be right; now I hope other gentlemen will decide on the merits of this question as they believe to be right.

Mr. TEST rose, and said he had intended to give a silent vote in this case, but he felt it imperiously his duty, as no one else had done so, to call the attention of the House to the most important question in the case, and that was the evidence; it was usual, where he had been concerned in the adjudication of questions concerning rights, to pay some attention to the evidence. That he was not willing, in a case of so much importance to the individual and the country as the right of a member to a seat in this House, to submit the whole decision to the doubtful construction of an obscure and ambiguous law. The elective franchise, said Mr. T., is one of the most valuable privileges of a free people, and ought to be held the most sacred. Where, as in Virginia, it is trammelled with so many exceptions and restrictions, the more cautious and circumspect we ought to be in our examination of the question, to see, in the first place, that justice is done to the people in a matter that deeply concerns them, and that an honorable member of this House should not be deprived of a right to which he is justly entitled. Sir, said Mr. T., I am not in favor of this property election at any rate: for I never did believe that the possession of a few dirty acres qualified a man to judge of my wants, my privileges, or my rights, better than I could myself; or that it made him any better than he who, through misfortune or some other cause, possessed none; besides that, it brings with it the evils which are now presented before us. In my own State no such difficulties occur; every thing is upon paper. When a vote is given, it is irrevocably given. No man, save the voter himself, knows to whom it was given. The state of the polls is never known until the ballots are counted; hence there is very little interest in purging them. But, sir, such is the law of Virginia, and such as we find it we must decide upon it. But, sir, it does seem to me very extraordinary, that the whole attention of the House has been engrossed with the discussion and examination of this law, whether the mayor of the borough of Norfolk had a right to continue open the polls more than one day, as if the whole weight and burden of the question rested upon it, to the total disregard of the evidence in the case. Sir, I hazard but little in saying that a total ignorance prevails in relation to the evidence; and I call upon any gentleman to say whether he has examined it and understands it. I know he does not, and for the best reason under heaven, he could not. And I will show directly, at least before I get through, that no man could understand it in the time we have had to look into it, if, in the mean time, he paid any attention to the ordinary business of this

House. I will venture to say, without boasting of my assiduity, that I have investigated the evidence as fully as any gentleman, and I do not hesitate to say that I am almost as far from understanding it now, as when I first opened the ponderous volume which contains it. Sir, I can assure you it is a matter of minor importance with me, whether the law will bear the construction contended for, or not; it does not decide the question one way or the other. It is true, according to the report of the committee, if the law shall bear the construction contended for by them, and their view of the evidence, as relates to the illegal votes, be right; why, then, Mr. Loyall is elected, and the sitting member, Mr. Newton, thrown out.

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It does seem to me as if the House had come to the conclusion that the determination of the point of law determined the question, and that the sitting member himself had agreed to rest it upon that contingency. Sir, it is not so. The sitting member never hinted such an idea. He has always claimed his seat, not only upon the law, but upon the testimony. It is true that in his speech he confined himself very much to the points of law, and for the reason that he had not had time, since the volume of evidence was printed, to examine it; and if he had examined it, he could have known nothing about it. And here, sir, permit me to say something about the report of the committee; for I am going to move to recommit it to the Committee of Elections, with instructions to designate by name those whom they find to be illegal voters, with a summary of the evidence upon which they found their decision; and in thus remarking upon it, I do not wish the honorable gentlemen who compose that committee to believe, for a moment, that I intend to impugn their motives, or that I have any unfriendly feelings towards them, for I can assure them it is not so. But, sir, while I have every confidence in them as men, I cannot be persuaded they are infallible; they may err, however, unintentionally; and that they have erred in this case, I am as certain as I am that they made this report. I have as good a right to believe that they have erred as that the judges or commissioners, who held the election in the Norfolk district, erred. The sitting member got a fair majority of all the votes given in the district; at least, he got more than Mr. Loyall; that is admitted by Mr. Loyall himself; and, as the votes stand at the polls, he is fairly elected: the committee say, however, that he received more illegal votes than Mr. Loyall, and therefore he is not fairly elected. They both got some illegal votes, but the sitting member got the most, they say, and, therefore, they vacate his seat, and give it to Mr. Loyall. As they have come to this conclusion, they must have done so from the evidence, and they ought to have given us the means of satisfying ourselves that they had come correctly to that conclusion. They ought to have given us a list of the names of those illegal voters, and a sum-

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mary of the evidence of their illegality. Then we could have judged for ourselves whether they were right or wrong; they have not done so. They ought to have given fully the principles upon which they applied the evidence; they have not done so. It must be made to appear to this House that the election was illegal, or this House is bound to decide it was right, for every presumption is in favor of the officers who held the election, that they did their duty, and that the sitting member was fairly elected. It was the duty of the committee to collate and arrange the facts, so that this House might draw the conclusion, not to take upon themselves to draw the conclusion, and leave the facts so deranged or clouded with mystery, that this House could not discover upon what grounds they came to the conclusion they did. Sir, when this case was first called up, an honorable gentleman from New York (Mr. STORRS) made the very motion I am now about to make, for the very reasons above given; but upon an assurance, as I understood it, from the committee, that a list of those illegal voters should be furnished, he was induced to withdraw the motion. In order to obtain this list, or a copy of it, I called upon the Clerk of this House, and was told that it was withdrawn, but that he had given a copy of it to the gentleman from New York. I then called upon that gentleman, who told me he had not the list, nor could he give a copy of it. I then, for the first time, determined to make this motion. Sir, I did think a little strange of such a proceeding, I must confess. I would simply ask, how is any man to get at the grounds of the decision made by the committee? It is totally impossible.

Here is a volume of evidence, containing upwards of three hundred pages in octavo form, without order, without arrangement; indeed, the whole seems transposed. The petitioning member has taken exception to upwards of 180 votes; and this evidence, taken at various times and places, is intended to apply to each separate voter, and show that he was not entitled to the privilege of voting; and the whole of it together, with the names, is mixed promiscuously through the volume in a perfect chaos. Why, sir, the committee had to apply the evidence to each name separately, in order to determine whether the individual was entitled to a vote or not; and that being the case, nothing would have been more easy than to have put down his name, with a short statement of the evidence, and then the House could have seen whether the committee were justified in the conclusion at which they arrived. It seems, indeed, that such a list was made; and how comes it that, on a motion of this kind being proposed, *that* list should have been produced, handed to the Clerk of the House, a single copy given to the gentleman from New York, and immediately withdrawn, and no member but him allowed to see it, or get a copy of it? [Here Mr. T. was called to order by a member of the Committee of Elections,

(Mr. TUCKER,) and directed by the speaker to sit down, but the Chair decided he was in order, and he then proceeded.] Mr. T. said he was at a loss to divine the cause of all this sensibility and impatience on the part of the gentleman from South Carolina, but he was not to be turned aside from his purpose, by any feeling of impatience that might be evinced; it was a disagreeable duty he had to perform, but he should not shrink from it. Sir, I ask why it was necessary to make this list, if it were never to be seen or used; being, too, the only criterion by which the correctness of the report could be tested; or why was it withdrawn after the gentleman from New York withdrew his motion to recommit. Sir, I am constrained to think a little strange of this proceeding. I think I heard it said from some quarter, and I believe it was from the chairman of the Committee of Elections, that it would be improper to expose such a list, as it might lead to the punishment of the persons who have thus illegally voted. Why, sir, that is no more nor less than to say that this House would omit to do justice in one of the most important cases that could come before it, for fear the guilty might be brought to condign punishment. I thought it a strange reason when I heard it, and I think so yet. A set of men violate the laws of their country in the most shameful manner, abuse the elective franchise, vitiate an election; by which the House is put to all this trouble to investigate the case, and the country to incur the expense, and by such audacity a man is foisted into a seat on the floor of this House, against the will of the majority; and we are now told that the names of such delinquents are not to be exposed for fear they might be punished. And what is the fear, if really such fears be entertained? The list rendered here cannot be given in evidence against them on the trial for the offence; besides, is there any more danger of exposure here than in the township or borough where the election was held, and where all this mass of evidence was taken? I should think not.

Now, sir, let us look a little at the subject-matter of the report. About 300 votes are objected to by the sitting member as illegal, and about 180 by the petitioning member. A volume of upwards of 300 pages is thrown upon our tables, containing the evidence in relation to those objections; the committee have come to the conclusion that, out of those three hundred objections made by the sitting member against Mr. Loyall's votes, fifty only are bad votes; while out of one hundred and eighty objections made by Mr. Loyall against the sitting member's votes, ninety-three are bad, or illegal. I say it does appear a little strange that about one-half of Mr. Loyall's exceptions should be sustained, and only about one-sixth of the sitting member's.

Ninety-three out of a hundred and eighty of the sitting member's votes are bad, while only fifty out of near three hundred of Mr. Loyall's are so; and, notwithstanding the com-

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mittee have discovered that there were given at that election, on both sides, one hundred and forty odd bad votes, yet they have not thought it necessary to give us the names of those whom they deem illegal voters. We are to take that upon faith. They had to select the names, and to apply the evidence to them; and it would certainly have been very easy to put them down with a summary of the evidence upon which they decided; then every member of the House could have decided for himself; but, as it is, no one can tell whom they have rejected, or how they have applied the evidence. But, as I have before remarked, the committee have come to the conclusion that fifty of Mr. Loyall's votes are illegal, and ninety-three of the sitting member's. Now, sir, I have examined the evidence in this case, I firmly believe, with as much diligence as the committee, and I have come to a very different conclusion. I think I understood from the chairman of the committee, they had found but four or five illegal votes in the borough of Norfolk altogether. Now, sir, I have taken the trouble to draw off a list of persons objected to as illegal voters, in the borough and county of Norfolk, and, so far from the number being limited to four or five, I find about fifty in the borough, and about seventy-five in the county, of illegal votes given to Mr. Loyall; and I will venture to affirm, without the fear of a successful contradiction, that, pursuing the principle of decision adopted by the committee, there will appear more than one hundred and fifty illegal votes given to Mr. Loyall in that election. The committee have attempted very feebly to explain the principles upon which they had distinguished a bad vote from a good, and, on an examination of the cases which they have put, I say it appears incontestably that, adopting their own mode of decision, they will, they must, throw out more than one hundred and fifty of Mr. Loyall's votes, instead of fifty, as they have done. Sir, I find mixed among this vast volume of evidence, a place in it where they have set down a few names as being objections to votes made by each; the evidence applied to Mr. Newton's votes is, that the names of the voters did not appear upon the property list, and, therefore, they were considered bad votes; but where the same objection is made against Mr. Loyall's votes, the committee tell us that the persons testifying had only examined the land books or list of freeholders, and could speak only from inspection; therefore, they reject the evidence, and say they are "good votes for Mr. Loyall," and declare "that they add them to Mr. Loyall's number." Now, I cannot for my life conceive how they are to add any votes to Mr. Loyall's number; he can certainly not be entitled to any additional votes more than he got at the polls, and yet they say they add those objected votes to Mr. Loyall's, because they find the witnesses had only inspected or examined the property list, or "land books;" and why a witness could not



testify that a man's name was not upon the list of freeholders, when he had inspected or examined the land books, would seem a little strange. Indeed, sir, there are abundant causes why this report should be recommitted, with the instructions I proposed; for I know that no gentleman in this House can understand it, nor can he come to any just conclusion about the matter of this election. Why, sir, I aver that, if you will throw out all the votes of those whose names do not appear upon the freeholders' list or land books, as they are called, instead of rejecting fifty of Mr. Loyall's votes, you will reject nigher two hundred and fifty. And here, sir, I beg leave further to say, that if these polls are fairly canvassed upon correct principles, instead of Mr. Loyall having a majority, as the committee have decided, of thirty votes, the sitting member (Mr. Newton) will have a majority of one hundred at least, and, I firmly believe, one hundred and fifty.

I have examined this evidence with all the care I was capable of, and I can assure you, sir, that, owing to the confused manner in which it comes before the House, it was a task of immense labor; but I have done so, with a view only to do justice to the country and the parties, and I have come to the conclusion stated; and I speak advisedly when I say that no impartial mind, upon the same examination, can avoid the same conclusion; and, although the labor of investigating the subject is enormous, it ought to be done before we decide; and, if it is to be done at all, I am satisfied in my own mind, that no gentleman can refuse his vote for adopting the means I proposed, in order to facilitate such inquiry. Sir, in regard to this little statement the committee have made of votes objected to by the parties, I beg leave once more to refer to it. In that statement I see the name of Andrew Bartle is objected to as a legal voter by Mr. Loyall, because he was not a freeholder, and his objection is sustained by the committee, and, of course, taken from the sitting member. Now, sir, let us see the evidence upon which they determined he is not a freeholder. They say that John C. Prior, or John E. Prior, (the committee call him by both names,) the sheriff of the county of Elizabeth City, and who, by the bye, turns out to be the agent for Mr. Loyall, testifies that Bartle was a freeholder on the books of 1829, acquired a title "by land deed," as it is called, proven 17th of January, 1829, and dated 6th of December, 1829, (I give their own words,) and, upon this evidence, his vote is thrown out, and taken off the sitting member. Now, what are the facts of this case, as they stand uncontradicted and unquestioned by both parties? Why, simply, that Bartle had owned, possessed, and lived on, cultivated, received the profits of, and paid the rent for, a freehold of seven hundred and nine acres of land, for eight years prior to the election; but it turns out, to be sure, that he made a deed to an individual

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Speech of Mr.  
Test, in oppo-  
sition to the  
report of the  
committee.



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1st Session.

Speech of Mr.  
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five years ago as an escrow, which was to have no effect unless a certain contingency happened, which contingency never did happen, and the deed, therefore, never had any effect, Bartle living on the land all the time, using it as his own, and paying taxes for it; that all this was known to the clerk of the court, and that orders had been given to reconvey the land to Bartle, twelve months prior to the election, but which order had been neglected till in December, 1828, (not 1829, as the committee report.) Now, sir, I will ask any gentleman if it can be contended for a moment that Bartle was not entitled to a vote as a freeholder. Was the estate ever out of his hands for a moment? Would a court of equity ever have decreed a title to the person who held this deed on conditions? They would not; they could not. All this testimony was before the committee, and yet they threw out his vote; and, what is still more extraordinary, Prior swears the deed of reconveyance was made in December, 1828, and the committee, against his oath, say it was made in December, 1829. Now, I am not disposed to attack the motives of the Committee of Elections by any means; but it does seem strange that, with all the acuteness and close inspection that the committee have given this particular part of their report, they could have placed the making of the deed of reconveyance a year after the actual time of making it, and that they could have decided that Mr. Bartle was no freeholder, even under their own statement of the evidence. But, sir, it was a mistake, an unintentional mistake of the committee, which goes to show, most conclusively, the absolute necessity of recommitting the report, that the House may have an opportunity of correcting their errors. If, in a particular point, to which the whole attention of the committee has been singly directed, in order to place before the House the principles upon which they have decided the case, such glaring mistakes are made, and such obvious errors committed, it goes to create a doubt of the correctness of the whole report. Although the House exhibits much impatience, I cannot refrain from taking another view of the case. It seems that, in the borough of Norfolk, a man is entitled to a vote who has kept house and resided six months in the borough, and has one hundred and sixty-six dollars and two-thirds worth of visible property. Now, sir, to prove the illegal votes given by this class of voters, one of the witnesses produced is a Mr. Dyson, who swears that he has been assessor for the corporation for about ten years, and commissioner of the revenue for the State.

This gentleman, of whom I know nothing, except as I see him here upon paper, appears to be an honest, impartial man; he appears to stand aloof from all party feelings and party predilections; he tells an unvarnished tale, without showing any disposition to turn to the right or the left; indeed, his

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integrity and veracity are incontestably proven from his long continuance in so responsible an office, and by which he must have acquired a knowledge of the circumstances of the citizens of the borough of Norfolk, amounting almost to a certainty. He held in his hand the official property list, and must have known those who held land or slaves, or, generally, any other property which would entitle a man to a vote. The next person introduced as a witness is a Mr. Guy, whose manner of testifying evinces him to be a man of the strictest integrity, honor, and veracity, who swears he has been constable and captain of the borough watch for six or seven years, and that he is generally acquainted with all the residents and housekeepers in the borough of Norfolk. And what, sir, is the evidence of these two men? I have taken a list of some of the votes, which, from their evidence, appear to me to be illegal, and find the number to be near one hundred given to Mr. Loyall in and about the borough of Norfolk; a very different account from what I understood by the chairman of the committee they had rendered in their report to this House. I might have misunderstood him, but I think he stated that they had found but four or five bad votes on either side in that district. Be that, however, as it may, there are more than one hundred of Mr. Loyall's votes proved bad, by testimony much more clear than that by which they have condemned the sitting members, in the example they have given in their report, and which ought clearly to be taken off him by the rules of evidence they have adopted for themselves in that exposé. I think, sir, it will appear very clearly, from the evidence of those two gentlemen, that Mr. Loyall received thirty or forty votes from aliens, foreigners not naturalized: some of those persons came before the justices, who took the depositions preparatory to the contest, and acknowledged their disability. Sir, the committee tell us they find ninety-three illegal votes given to Newton, and fifty to Loyall. I feel no hesitation in saying that, according to their own rule of deciding, the converse is true, if the polls be fairly canvassed; and who so capable of doing so as the witnesses who have been called for that purpose, persons whose offices naturally lead them to an intimate acquaintance with every man's circumstances in the election district? Why, sir, I think it will be found that Mr. Dyson swears to nearly fifty persons who are charged with a poll tax, which is evidence that they had no taxable property, and, of course, are excluded by the laws of Virginia from being voters, besides the aliens not naturalized. I say, sir, this is the way the evidence presents itself to me, in the report the committee have made to the House, and if I be wrong, I can be set right, as well as every other gentleman in this House, by taking the course I propose. A word more, and I have done. I understand the doctrine of the case to be this: Every public officer is pre-

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sumed to have done his duty till the contrary appears; hence we are to suppose the judges or commissioners who held the election in the congressional district from which those two gentlemen came, have done their duty. They have returned the sitting member as duly elected; he is now holding his seat; he obtained a fair majority of all the votes given. Mr. Loyall is claiming his seat, and, if he obtains it, it must, or ought to be, by proving more illegal votes given to the sitting member than to himself, to the number of the sitting member's majority over him, and all the burden of the proof lies upon him: he must make out his case, or he cannot oust the sitting member of his seat. And here, sir, let me remark, that judges of elections are generally men of the first standing in their counties, chosen for their respectability, probity, and general acquaintance with the citizens: ought not, therefore, more reliance, in general, to be placed upon their decision in relation to legal or illegal votes, than upon any posthumous decision, whatever the testimony may be, especially, too, as they act under oath themselves, and have the power of tendering an oath of qualification to any voter whom they may mistrust? And in this case no improper conduct, or even remissness, is attributed to them; or misconduct on the part of either of the candidates, as I have heard. And when I say that so many illegal votes appear from the evidence, according to the manner in which the committee themselves have applied it, (and I do say that, according to the principles which they have adopted for their own guide,) I firmly believe the sitting member, instead of being thirty votes in the minority, will have more than a hundred of a majority. For it is altogether unaccountable how it could happen that, without any misconduct on the part of any one, either judges or candidates, there should be such a vast difference of illegal votes given to the different candidates; and how the committee could discover that the large difference of illegal votes were given to the sitting member, while the evidence, as I read it, clearly shows it to be the other way. I do not blame the motives of the committee, but I am compelled to differ with them in regard to what they have thought their duty in this case. I should have thought it a duty to have returned a list of the names of the illegal voters, with the report itself, as it seems they did make one, and that after the gentleman from New York had withdrawn just such a motion as I have now made, in consequence of their presenting him with that list, I should have thought it my duty, at least, to have left it on the Clerk's table, so that a copy of it might have been got. However, all these difficulties can be remedied by adopting the motion which I propose.

Mr. SPENCER, of New York, rose, and said that a most delicate duty had devolved on the House, the duty of deter-

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mining which of two gentlemen should associate with us in the high duties of legislation. That the petitioner for a seat here (Mr. Loyall) had, by his conduct and talents, conciliated the favor of the House, whilst, on the other hand, the sitting member (Mr. Newton) had grown old in the public service, and was universally esteemed and respected. In determining the rights of these gentlemen, the House would and must discard all other considerations than those of right and justice. It having been distinctly admitted by the chairman of the Committee of Elections (Mr. ALSTON) that Mr. Newton, the sitting member, was elected, and entitled to retain his seat, if the mayor of Norfolk had a right to hold the election in that borough but one day; the questions to be decided were principally legal ones, depending on the construction of certain statutes of Virginia. He said it would be rash and arrogant in him to venture to give his opinion on those statutes, had they received a construction by the constituted authorities in that State; this was not pretended, and they were now for the first time to receive a construction independent of the usages under them. He said, under these circumstances, and inasmuch as the principles of construction were of universal application, whether to a law of New York or of Virginia, he felt no embarrassment on the subject, and he could no further defer to a lawyer of Virginia on this question, than to a lawyer from any other section of the Union. He said, from all the enactments, it was evident that the Legislature of Virginia intended that the elections throughout the State should be holden but one day; this undoubtedly proceeded from the consideration that protracted elections caused loss of time to the people, and much expense, and probably unnecessary agitation; but the Legislature foresaw that there might be causes which would prevent the electors from giving their votes and expressing their choice of Representatives, and they wisely provided against such casualties.

The statute of Virginia, arranging the counties into districts for the choice of Representatives to Congress, enacts "that the like proceedings shall be had for conducting, continuing, and closing the poll in each county of a district as is prescribed by law in the election of members to the General Assembly."

The 15th section of the statute of the 27th of January, 1818, provides that "if the electors who appear be so numerous that they cannot all be polled before sunset, or if, by rain or rise of watercourses, many of the electors may have been hindered from attending, the sheriff or under-sheriff may and shall, by request of any one or more of the candidates, or their agents, adjourn the proceeding on the poll until the next day," &c.

The question then is, whether, upon any known and established rules of construction, the power of adjourning

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over the poll beyond one day, thus given to sheriffs, can extend to the mayors of cities, who, by law, are to preside at the elections within their respective corporations. Before this question can be answered satisfactorily, some facts must be stated. The precise provision contained in the 15th section of the act of 1818, authorizing sheriffs and under-sheriffs to adjourn over the poll, and for the same causes, was contained in an act of Virginia of 1785, and that power never has been expressly given to mayors of cities. The act of 1818 professes to be a revision of all former laws on that subject; it appears to be penned with great ease and accuracy. In various parts of the act mayors of cities are mentioned, and their duties and powers are specifically pointed out. In the 16th section, immediately following the one under consideration, special provision is made in case the mayor of any city or borough is unable to attend or conduct the election, that the recorder, and, if he be unable, the senior alderman, capable of attending, shall attend and conduct the election: in short, in some half dozen instances the mayors of cities are recognised in the act of 1818. It is incredible, from all those considerations, that the Legislature should have omitted the words "or mayors" in the 15th section, from inadvertence or mistake.

Denies the  
power of the  
mayor to ad-  
journ the poll.

There are many reasons why the power of adjourning over the poll, given to sheriffs, should have been denied to mayors of cities. The cities are small, and it is in proof in this case, and without contradiction, that electors living in the extreme parts of Norfolk could, in ten or fifteen minutes, walk to the court-house. Rains, which in counties would prevent electors from riding twenty or thirty miles to come to the court-house, would, in small cities, have no influence to prevent the electors from taking a short walk. In the counties the swelling of the watercourses, carrying off the bridges, or rendering rivers unfordable, might hinder and prevent many electors from voting, which causes could not exist in cities. It is in proof, without contradiction, that the election in the city of Norfolk never has before been adjourned over, and we have no proof that it has ever been done in any incorporated city or borough in that commonwealth. It is clearly proved that, but for the delay in opening the poll at this very election, all the legal votes might have been polled in one day. The question then returns, whether the significant words "or mayors" can be interpolated, and the powers given to sheriffs to adjourn the poll be extended to mayors of cities.

If the case required it, and the powers of the sheriffs and mayors of cities were the same, and if the circumstances of the counties and cities were substantially similar; if the same necessity existed for extending the same powers to the mayors as were given to sheriffs of counties to adjourn over, then he admitted that the 15th section might be con-



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strued to extend to mayors. He said the intention of the Legislature was to be regarded in the construction of an act; all its parts were to be collated, and the spirit and intent of the enactment sought for, and, when ascertained, applied to its construction. The case stated by the gentleman from Virginia, (Mr. SMYTH,) that a law in relation to executors had been decided to apply to administrators, though not named, was an illustration of the principle; the only difference between them being in the origin of their powers, an executor deriving his authority from the testator, the administrator from the law. If their powers and duties had been different, it would never have been so decided. He said that words were the signs of ideas, and they were the only means of finding out the intention of lawmakers. But lawmakers may imperfectly express their meaning; and where it was manifest that the words of an enactment failed to express clearly the intention, by the omission of words, and the good sense of the thing and the spirit of the law required that such omission should be supplied, because the thing omitted stood precisely in the same situation with the thing expressed, then, and then only, could the omitted words be supplied. He was aware that in penal statutes the rule was rigid, and they were construed according to the letter. He said, if the Legislature of Virginia could have been asked why they omitted the words "or mayors" in all their enactments giving sheriffs the power to adjourn over, their answer must be, because these cases were entirely dissimilar; that the causes for adjourning over county elections did not exist in the cities; and he insisted that, from all the considerations he had stated, it would be a violation of all known and established principles to interpolate the act in such a manner as to extend the 15th section to mayors of cities.

He said all the evidence proved that had the mayor of Norfolk done his duty, by opening the poll according to notice, at 10 o'clock instead of 1 o'clock, there was abundant time to take all the legal votes. The mayor, it seems, waited for the candidates to get through their addresses. He knew of no law authorizing this. Perhaps his opinion of the impropriety of thus waiting arose from such a procedure being unknown to the people in the State he represented. There a candidate's addressing the people in commendation of himself, or his principles, or his capacity, would be thought an act of madness.

In Kentucky it is conducted otherwise, and the procedure was much to be preferred; the candidates there addressed the people before the election, but never to the hindrance of the poll.

He said, admitting, for the sake of the argument, that the mayor of Norfolk had the right to adjourn over the poll, yet, in his opinion, the contingency had not happened, authorizing the adjournment over of the poll beyond the first day;



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the allegation is, that the electors were too numerous to be polled on the first day. The mayor and two others have testified to this fact, and that there were several electors present just at the going down of the sun, who had not voted. It is proved on all hands that the day was fair. It is indisputably proved that there were several intervals of from five to ten, and fifteen minutes, when no votes were given, and that, notwithstanding the unusual delay in opening the poll, all the legal voters might have been polled in one day. Now what are the requisitions of the statute? That "if the electors WHO APPEAR be so numerous that they cannot all be polled before sunset, then the proceeding on the poll may and shall be adjourned," &c.

The case of Bassett and Bayley, decided by this House, shows that the power to adjourn over is not a discretionary one, but that the facts authorizing an adjournment must appear to exist; and that, if an adjournment of the poll is made without being warranted by the state of facts, this House will rejudge the decision of the sheriff. It did rejudge his decision in the case referred to, and decided that the votes given on the second and third days were nullities, because the contingency had not happened authorizing the adjournment of the poll.

He said, in the present case it did not appear when the electors had come to the poll; they may have presented themselves for the first time just at sunset, for the express purpose of procuring the adjournment. He was of opinion that the electors were bound to use reasonable diligence to get in their votes on the first day, and if they chose to absent themselves when their votes could be taken, they had no right to require an adjournment of the poll, because they had neglected to perform their duties. If it should be considered a good reason for adjourning the poll, that electors presented themselves for the first time at the moment the sun was setting, then adjournments might be unnecessarily and fraudulently procured, and the intention of the act perverted. He said no such exposition of the act ought to be made as would open the door to fraud; it ought to appear affirmatively and distinctly that the electors who could not be polled, had entitled themselves to an adjournment by being present a reasonable time before sunset, and who could not be polled for the press of voters. Did such facts appear? There was no evidence showing when the electors who were present at the setting of the sun came to the poll. Not one of them had been examined to make out the necessary facts; for aught that appeared, it was a mere pretence that the unpolled electors were either numerous, or had been in attendance a reasonable time before sunset. He contended that the sitting member was entitled to retain his seat, unless the petitioner exhibited facts showing affirmatively the occurrence of an event justifying an adjournment of the poll, and this had not

been done. He said that, in his decided opinion, the mayor of Norfolk had no authority to adjourn the poll; and, if he had, that the contingency had not happened which justified his doing so. That, on all questions regarding elections, the House acted judicially, and it was of the utmost importance that our decisions, which are to serve as precedents, should be founded on principles that will bear re-examination.

Mr. DODDRIDGE. Mr. Speaker: I will ask the indulgence of the House to add a few words to what has been said in support of the sitting member.

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member.

I had thought the argument of the honorable gentleman from New York (Mr. SPENCER) sufficient to produce universal conviction, and will not subject myself to the task of repeating what has been so much better said by him than I could have any pretensions to say.

My honorable colleague (Mr. BARBOUR) who has just taken his seat, has insisted that whenever it is necessary to supply words in a statute, in order to give effect to the known, apparent will of the Legislature, the words necessary may be so supplied; and that, in the case under discussion, all the election laws of Virginia, as other statutes made *in pari materia*, are to be construed together.

I agree with my colleague perfectly.

The laws, then, for choosing electors of President and Vice President of the United States, for electing members of Congress from Virginia, and the general election law of that State for members of the Senate and House of Delegates, are to be expounded together as one law; and the question is, whether, from a fair examination of these laws, a power can be inferred in the mayor of a city or town corporate, to adjourn or continue the poll at an election for Congress, or for members of the State Legislature. I maintain that a mayor has no such power, and that, until our towns and cities shall vastly increase their population, it would be unwise to confer it.

The reason for allowing the polls to be continued in the counties, does not exist in our cities and towns. In the latter the people are at home, and are not liable to lose their votes on account of "rains or rise of watercourses," the only contingencies deemed sufficient for an adjournment in the counties. The power in question is not given to the mayor *expressly*; and if it is to be supplied by construction, it should only be so supplied to give effect to the *known, apparent* will of the Legislature.

It will be conceded that *fairness* in elections is a great and controlling desideratum with the Legislature and people, and the desire to promote it is manifest throughout our legislation on the subject. That all those qualified should vote, is, indeed, very desirable; and it is to effect this object that an adjournment of the poll is permitted under any circumstances. The general election law was enacted in 1785.

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opposition to  
the report of  
the committee.

It has, like the other laws *in pari materia*, gone through several revisions unchanged, except by that of 1819. When this law was first made in 1785, Norfolk was a small place rising from its ruins; Richmond was but begun; and Williamsburg, perhaps, never contained more than one hundred voters; and these were then the only towns entitled to separate representation. To these a fourth, Petersburg, has since been added. Who can suppose that, in 1785, a single member would have thought of the necessity of authorizing a mayor to adjourn the poll in these small towns on account of "rains or rise of watercourses?" In 1785, we had counties in which voters had to travel more than a hundred miles to exercise their rights—counties a hundred and fifty miles square, and containing more than one river, and more than one mountain to cross; and if it was, as all admit, an object with the General Assembly to afford opportunities to all, it was necessary to authorize a continuance of the poll under certain contingencies. One of my honorable colleagues has spoken of Richmond as a city divided by a rapid stream. Towns so divided are apt to erect bridges over streams within them; and the small creek in Richmond is so bridged that the traveller does not know when he passes it. In towns, if an adjournment were permitted, many opportunities would be afforded for tampering with voters; for intrigue and management by candidates and their friends, (when men could be found base enough to employ unfair means,) to prevent a fair and honest expression of the public will. The voters are at home, and can be assailed, while in the counties they are hindered from assembling by the very causes which authorize a continuance of the polls. Should the Norfolk election be overturned, a precedent will be established, by which unfair practices will be sanctioned. A few friends of either candidate may remain at home engaged in their town or city pursuits, or even loitering in the streets, but who, appearing on the sunsetting, may require a continuance of the poll. Time will be thus afforded for all that unworthy practices of electioneering can effect. The precedent we may be about to establish, will teem with evils you little think of.

My honorable colleague has said that, in our State, candidates are in the habit of addressing the people, and the people of hearing them, and that, if an officer should venture to open the poll before this is done, he would incur the censures of those for whose benefit the election law was made.

I agree with my colleague that these public addresses to the people, with the *viva voce* vote, are great securities against slander and misrepresentation. In large counties, however, it is customary to open the polls at the time or before the candidates take their stand to address the people. There are many who come to the election with their minds made up, and who wish to give their votes, and return to

their homes; and there are many in towns who care nothing about the speeches of candidates. These can be voting, while candidates or their agents are speaking, and I have seen the largest counties in the district I represent, vote in a day, and finish some time before sunset.

Mr. Speaker: My honorable colleague loudly extols the freehold suffrage and *viva voce* vote, so much so, that I am almost led to hope he will concur with me in rejecting the constitution we have lately proposed to the people of Virginia, though for different reasons.

While my colleague thus extols freehold suffrage, and the *viva voce* vote, he cannot forget that the statesmen of 1785 borrowed both from the laws and customs of the land of their forefathers, and he ought not to forget that, with the right of suffrage, and the manner of giving the vote, they borrowed also the method of taking it. As in England, they made the sheriffs of counties, and the mayors of cities and boroughs, the returning officers and judges of elections; and that, as in England, they authorized sheriffs, in certain cases, to continue their polls; and, further, that, as in England, they gave no such power to the mayor of a city or town.

I have no doubt that that has long been known to the honorable Speaker, which I never knew until this morning, that, notwithstanding the immense population of the city of London for several centuries back, it was not until since the accession of the present royal family to the throne of England, that the mayor of that great metropolis was authorized to continue his poll; and, when he obtained this power, it was not by *inference and construction*, but by *express statute*.

The second section of the act respecting the choice of electors has a provision which, when compared with that in the fifteenth section of the general election law, for continuing over elections of Senators and Delegates, furnishes a strong argument against the power of a mayor. The second section of the law providing for the choice of electors, requires the Executive to appoint commissioners to take the poll for each county, and for the cities of Richmond and Williamsburgh, and boroughs of Norfolk and Petersburg. Here the cities and boroughs are expressly included, and the same section provides that "*if it shall appear to the said commissioners that the persons entitled to vote were prevented from attending by bad weather, or from any other cause, they are empowered and required to keep the poll open for a term not exceeding three days.*"

There is a discretion left with the commissioners. "*If it shall appear to them,*" &c., and the provision is latitudinous, compared with that in the general law. Other contingencies will suffice, besides "rain or the rise of water-courses," or the appearance of too great a number to be polled before sunsetting. To the sheriff no discretion is

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continued.

given. There must appear too great a number to be polled before sunseting, or the voters must be prevented from attending by *rain or rise of watercourses*. No other cause will authorize an adjournment; not the existence of an epidemic even will answer. When these contingencies do happen at a county election, the sheriff cannot adjourn the poll, unless requested by one or more of the candidates or their agents. Why this difference? The commissioners in the other case not only are authorized, but required to adjourn. The reason is obvious. At one of these elections there is neither a candidate nor the busy agent of one, and, therefore, there is no danger of those improper and demoralizing practices which sometimes occur where they are; whereas at the general elections, the law expressly recognises their presence and agency. The words of the fifteenth section of the general election law are these: "If the electors who appear be so numerous that they cannot be all polled before sunseting, or if, by *rain or rise of watercourses*, many of the electors may have been hindered from attending, *the sheriff* or under-sheriff may, and shall, by request of one or more of the candidates or their agents, adjourn the proceeding," &c.

My honorable colleague draws an argument from the third section of the act for the election of members of Congress. The words relied on by him are italicised in the copy printed for the House, and are the following: "*Like proclamation shall be had for conducting, continuing, and closing the poll in each county of a district, as is prescribed by law in the election of members to the General Assembly.*" My colleague says it is admitted that the words *cities and boroughs* must be interlarded, or supplied in this clause, to give to it the proper effect, and I perfectly agree with him that these words must be so supplied. From this admission, he asks, why, then, may not the words "or mayor" be supplied in the fifteenth section of the general election law? With due respect, I consider this as amounting to nothing more than a plain *petitio principii*. Why do we admit that the words "cities and boroughs" must be supplied in the sentence just quoted? The answer is, to carry into effect the *known and apparent*, nay, the *declared* intention of the section containing the sentence alluded to.

That section commences by enacting that "the persons authorized by law to hold elections for members of the General Assembly, *in each county, city, and borough*, shall conduct the said election", &c., (meaning the election for members of Congress,) at which election the preceding section provides that "the persons qualified by law to vote for members of the House of Delegates, in each county, *city, and borough*," shall vote, &c.

The law which authorizes the voters in each county, *city, and borough*, to vote for members of Congress, and requires



elections to be holden for this purpose in each county, city, or borough, when referring to the general law for the rules by which the proceedings at congressional elections are to be conducted and governed, must necessarily be understood as intending to apply those rules to all the elections authorized by it.

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continued.

Let, then, the sentence be corrected, by supplying the omitted words, and it will read thus: "Like proclamation and proceedings shall be had for conducting, continuing, and closing the poll in each county, city, and borough of a district, as is prescribed by law in the election of members to the General Assembly." Then let the question be asked, which is the subject in debate, What continuing of an election is prescribed by law, in case of an election for members to the General Assembly? The answer is easy, and is to be found nowhere but in the second section of the general election law, by which, *reddendo singula singulis*, sheriffs are expressly authorized to continue the poll in certain cases, and mayors are not so authorized. There is no provision of any law from which an inference can be drawn, that such has ever been the legislative intention, and, therefore, there is no authority to supply, by construction, the words in question.

The argument will not stop here. It has been stated already that the general law was made in the year 1785; it has, with the other laws of the State, undergone so many revisions that I can scarcely recollect or state them; the last was in 1819. For the information of members, other than my colleagues, I will state our usage in making those revisions. At one session of the General Assembly a committee is appointed to revise the laws during the recess. These revisers are eminent jurists of the bench and bar; they reduce all the written law of the State on the same subject into one act, and report to the next Assembly bills to "reduce into one act," &c. &c. At the spring elections following, the heads of the bar in different parts of the country are elected to assist in acting on those revise bills at the next session. The work of revision has been simply that of revision in most cases, until the year 1819: at what was then done some rejoice, and others feel regret. That Assembly not only revised but amended the laws; they paid the most exact attention, not only to supply each *casus omissus*, to remedy each defect, but to exercise the closest attention to the grammatical construction of sentences. Whoever will examine the revised code of that year, will perceive, in many cases, after the word "he," the words "she or they" between inverted commas: he will perceive where the words "he or she" had been formerly employed, the words "or they" added, and standing between inverted commas. The explanation is this: for the ease and convenience of judges, lawyers, and students, whatever the revisers of 1819



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21st CONGRESS,  
1st Session.

Speech of Mr.  
Doddridge,  
continued.

added or supplied, is printed between inverted commas. You know, Mr. Speaker, that the Assembly of that year, particularly the Senate, contained many of the most profound, eagle-eyed jurists of our country; men whose industry and vigilance nothing escaped. With this explanation I will proceed to expound the fifteenth and sixteenth sections of the general election law, and in doing this I must refer members to the printed copies now in their hands. The fifteenth section is, and, ever since it was first enacted in 1785, has been, in these words:

“No elector shall be admitted to poll a second time at one and the same election, although at the first time he shall have given but a single vote.” If the electors who appear be so numerous that they cannot all be polled before sunsetting, or if, by rain or rise of watercourses, many of the electors may have been hindered from attending, *the sheriff or under-sheriff* may and shall, by request of any one or more of the candidates, or their agents, adjourn the proceeding on the poll until the next day, and so from day to day for four days, (Sundays excluded,) if the same cause continue, giving public notice thereof, by proclamation, at the door of the court-house, or other place of holding such election, and shall, on the last day of the election, conclude the poll according to the directions aforesaid; but if the poll to be held at any such election is not closed on the first day, the same shall be kept open for two days thereafter at least.

I have already said that the eagle-eyed revisers of 1819 found nothing in this section which needed amendment, nothing omitted which ought to be supplied. As now printed, it is a literal copy of the same law of 1785. Our cities had not grown to such a size, had not so increased their population, that, like the city of London, their mayors ought to be authorized to adjourn the poll for any cause. Had they so thought, they would have supplied the defect in the same manner they did a defect which they detected in the sixteenth section immediately following.

The sixteenth section, as enacted in 1785, and as retained in every revision that followed until that of 1819, was as follows: “In all cases where, by law, the sheriff is directed to hold an election, in case of the death of the said sheriff, the senior magistrate, and in his absence, inability, incapacity, by being a candidate, the second, and so on in succession, to the junior magistrate, is hereby empowered and required to perform the duties of the sheriff prescribed by law in similar cases.”

Here the sixteenth section ended. But the revisers of 1819 added to it what you now read within inverted commas, thus: “*And if the mayor of any city or borough, entitled to representation in the General Assembly, shall, by death, or any other cause whatever, be unable to attend and conduct the election, according to the provisions of this act, then the*

recorder, or if there be no recorder, or he be unable to attend, the senior alderman capable of attending, shall attend and conduct such election according to law." 1830.  
21st CONGRESS,  
1st Session.

The next senior magistrate to the sheriff in a county is the eldest justice of the peace, and the next senior magistrate to the mayor in a corporation is the recorder, or, where there is no recorder, the senior alderman. Speech of Mr. Doddridge, continued.

According to the doctrine of my colleague, there was no necessity, in 1819, to make the above addition to the sixteenth section. According to him, the words "or mayor" could have been supplied by interpretation, and that supplied, the term "senior magistrate" would apply to county and city.

A stronger reason would have existed for this liberal construction in this case, than in that provided for in the fifteenth section. As to that, I have said already that the Legislature had nowhere intimated a wish that an election in a city or town corporate should be adjourned: but that one should be holden, was their main object. To this purpose their whole legislation was directed; and the death of a mayor was just as possible as the death of a sheriff. Either would prevent an election, and thus defeat the main design; yet the revisers, and the whole Assembly of 1819, were of opinion that the words "or mayor" could not be supplied by interpretation and construction, even to save the election itself, much less the adjournment of one; and therefore they added to the sixteenth section an express provision to provide for what they viewed as an omission—a *casus omissus*. The revisers of 1819, and the whole General Assembly of that year, were either right or wrong in their interpretation of the sixteenth section as they found it. If they were right, the sitting member is entitled to his seat; but if they were wrong, my honorable colleague is wiser than the revisers, and the whole Assembly of 1819, put together.

With the construction put by the revisers, and also by the General Assembly, on the sixteenth section, that the words "or mayor" could not be added by implication to the word "sheriff," to prevent an election from being lost by the death or inability of the mayor, no one can imagine that they supposed the same words "or mayor" could be added to the words "sheriff or under-sheriff," in the fifteenth section, merely to authorize the *continuance of an election*. We may rest perfectly assured that had the revisers and Assembly of 1819 found our cities so vastly increased in population as to require the continuance of the polls at their elections, they would have supplied the necessary words, and we would have found them, as we find all their additions to the general laws of the land, printed between inverted commas.

If more proof of the truth of our interpretation were wanting, the seventeenth, twenty-first, twenty-second, and twenty-third furnish it.

1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Doddridge,  
continued.

The seventeenth section, as it stood before the revision of 1819, enacted a penalty on "magistrates" refusing to perform their duties under the sixteenth section. Here again the revisers, not supposing the "recorder or alderman" could be embraced by *interpretation*, inserted those words so as to embrace them *expressly*, which they also did in the provisions for certifying the elections, beginning with the twenty-first and twenty-second sections: and all that follows, in the general election law, is subject to the same remark.

Mr. Speaker, having understood from every quarter that the sitting member is entitled to his seat, unless the mayor had power to adjourn the polls, and having made up my mind against the petitioner, on that question, I have not examined the testimony to see whether either of the contingencies happened, on which the sheriff of a county is authorized to continue an election.

Petitioner ad-  
mitted to his  
seat.

After the conclusion of the foregoing speeches, the vote of the House was taken on the resolution reported by the Committee of Elections, as heretofore stated, (see p. 557, *ante*,) and Mr. Loyall, the petitioner, was admitted to his seat.

CASE LVIII.

THOMAS D. ARNOLD vs. PRYOR LEA, of Tennessee.

[Inspectors required, by law, "to take charge of the ballot box;" considered sufficient if they deliver it to another person to keep for them.

"Ballots to be placed in a box, which shall be locked, or otherwise well secured:" in this case a gourd was used, and the variance was held not to invalidate the election. The inspectors of a particular precinct not having been sworn as directed by law, this will not vitiate the whole election.

"Inspectors and clerks to be sworn." Three inspectors were appointed, and one of them, being a justice of the peace, swore himself and the others; held good.]

The petition of Thomas D. Arnold, complaining of the undue election and return of Pryor Lea, having been referred to the Committee of Elections, they, on the 29th of December, 1829, made the following report:

That the right of P. Lea to a seat in the twenty-first Congress of the United States, is disputed upon the following grounds, as set forth in said petition: "That perjury and subornation of perjury were resorted to; that bribery, direct and indirect, was resorted to; and, in short, to ensure the defeat of your memorialist, the laws of Tennessee, which prescribe in a special manner the mode of holding elections, were completely prostituted and trampled under foot, by the official authorities who conducted the election, and their own partial, prejudiced, and malignant passions substituted in place of the laws of the land."

Report of the  
Committee of  
Elections.

Notwithstanding these general and indefinite allegations, and the exceptions filed to them by Pryor Lea, the committee chose to go into an examination of the documents submitted to them by the House, on the part of said petitioner, and also of said Pryor Lea, with a view of presenting to the House the true grounds of controversy between the said parties.

It appears from the testimony, that at Tazewell, in the county of Claiborne, the inspectors, the clerks, and sheriff, holding the election, were in favor of the election of P. Lea, and some of them had made bets on the election; that, on the evening of the first day, after the polls were closed, the inspectors sealed up the ballot box, as required by law, and directed the sheriff to lock it up in some place where it would be safe, and that, with the consent of said inspectors, the same was locked up by him in a trunk in one of the rooms of the storehouse of Hugh Graham & Co., in Tazewell, where the ballot box had been kept at elections for many years before. When these facts were made known to the friends of Arnold, on the

Statement of  
facts in  
evidence.

**1883.**  
**2nd Circuit,**  
**1st Session.**

**Report of the**  
**Committee of**  
**Elections.**

**The proceed-**  
**ings at the elec-**  
**tion.**

same evening, they complained of the ballot box having been deposited there, and wished it removed. The inspectors of the election having dispersed and left the town, the sheriff declined interfering further with the box. The sheriff kept the key of the trunk, and one of the firm of H. Graham & Co. kept the key of the outside door of the house, which was also kept locked. On the second morning of the election, the inspectors, learning that complaints had been made, sent one of their own body, with the sheriff and one of the electors, after the box. The same was delivered to them without the appearance of injury. For the purpose of giving entire satisfaction, the inspectors procured another box for the second day's election, and did not unseal the box of the first day until the election closed. When the votes were counted out, it appeared that there was the same number of tickets counted out of the box that had been put in it, as registered by the clerks, and of these the petitioner received a majority of one hundred and forty-two votes, and received a majority of fourteen votes from the box of the second day; it is also in proof that the sheriff frequently said, before the election, that the petitioner should not get a majority in his county, and that he would see to it. There is also evidence showing that the sheriff, upon some occasions, claimed the right of keeping the box, and swore that he would do so; but it is evident from the proof, that the box was disposed of according to the direction of the inspectors. It is also in proof that the inspectors, the clerks, and sheriff, and all the members of the firm of Hugh Graham & Co. have good characters, and are esteemed as men of integrity and honesty.

**Gourd used for**  
**a ballot box.**

It is also in proof that, at the precinct at Berry's, in said county, a large gourd was made use of by the inspectors for the reception of the tickets, and upon the closing of the polls on the evening of the first day, the gourd was carefully stopped and tied up in a handkerchief, and delivered to one of the inspectors for safe keeping; that the same was taken home with him, and locked up until next morning, and then returned and used the second day. There is no evidence of fraud or mismanagement in any other way. There were about two hundred votes received there, of which the petitioner received about one-third. It is in proof that the inspectors, clerks, and officers holding the election, are men of integrity and honesty.

**Allegation of**  
**bribery.**

It is attempted to be proved that bribery was resorted to by the friends of Lea, at Knoxville, in said district, and the only evidence produced in support of the allegation, is a witness who swears that he heard Isaac Lonas say that he had been hired to vote for Lea, which, in the opinion of the committee, is inadmissible; but, if admissible, unworthy of credit. It is also attempted to be proven, on the part of the petitioner, that Eli Hill was under age, that the friends of Lea urged him to vote, and that he offered his vote, and was

qualified by the inspectors, and swore that he was of age; and the only evidence offered of his infancy, is the proof of a witness, who swore that he heard his grandmother say, two years before the election, that he was only sixteen years old; which, in the opinion of the committee, is inadmissible, either to destroy the oath of Hill, or reject his vote.

1838;  
2d Congress  
1st Session;  
Report of the  
Committee of  
Elections.

It is also in proof that at the precinct election, holden at McGinniss', in Grainger county, in said district, the inspectors of the election were not sworn, nor were the clerks. Two of the inspectors were in favor of the election of the petitioner, and the other in favor of Lea; and that the petitioner received one hundred and twenty-two votes, and Lea fifty-four at that precinct.

It also appears that at Tanawell one of the inspectors kept a list of votes that he believed illegal votes, and which did not exceed eight in number, and after the votes were all counted out, the inspectors deducted the number of illegal votes from the party for whom they were supposed to have been given; and that more votes were deducted from Lea than Arnold.

Objections are also made to the persons holding the election, and the manner of conducting it, at the precinct election at McFarland's, in the county of Jefferson, in said district.

It appears, from the testimony, that the county court of Jefferson appointed Barton Jarnagan, Thomas Roddy, and Robert McFarland, the inspectors; that Barton Jarnagan is the reputed cousin of Pryor Lea; and that Robert McFarland and the sheriff, Carmichael, who held the election, married each a sister of the mother of Barton Jarnagan; and that Noah Jarnagan, the uncle of Barton Jarnagan, married the aunt of Thomas Roddy; and that, after the election was closed on the first day, it was agreed by the inspectors, that Roddy and Jarnagan should take the ballot box, which was sealed up by them, to the house of the sheriff, Carmichael, and there have it locked up; and that Roddy should take the key of the place, when the box was locked up, home with him; and that Jarnagan should remain all night, to prevent any interruption of the box; which was accordingly done, the box was locked up, the key taken by Roddy, and Jarnagan remained all night at the house of Carmichael, and the box returned to the inspectors, without any apparent injury. Jarnagan, Roddy, McFarland, and Carmichael, are all proven to be men of good character and unimpeached integrity; and there were between three and four hundred votes taken at that precinct.

Of the ballot  
box, how kept  
at night.

Exceptions are also taken to the manner of conducting the election at Unitia, in the county of Blount, in said district; and, from the testimony, it appears that three inspectors were appointed by the county court of Blount; and one of them, a justice of the peace, who qualified the other two

Further excep-  
tions taken.



1850.  
2d Congress,  
1st Session.

Report of the  
Committee of  
Elections.

inspectors and himself at the same time, and also the clerks. At the close of the first day's election, the ballot box was delivered by the inspectors to Francis Shaw, the uncle of John J. Shaw, the deputy sheriff, who held the election; who locked the same in his writing desk, and delivered the key to John J. Shaw, and locked his store door, and kept the key of that himself. Francis Shaw is a blind man, but who managed his own store, except when accounts had to be entered, which he procured others to do for him. The next morning, the box was redelivered to the inspectors, without apparent injury. It further appears, that John Jones, who was under age, offered to vote at Marysville, in said county, but was rejected; and that the petitioner, knowing this fact, loaned his horse to Jones to go to Unitia, another precinct in said county, to vote on the second day of the election, and Jones went and voted.

There is no return of the votes furnished the committee from the whole congressional district; but it appears, from the notice of the petitioner to Lea, that said Lea obtained a majority of two hundred and seventeen votes in the whole district.

Parties allowed  
to file written  
arguments.

The committee, when the examination of this case was commenced, were willing to hear the parties discuss any questions, either of fact or law, that might arise in the case, and so informed them. In the course, however, of the examination, there was such an exhibition of feeling between them, as induced the committee to change their determination, and they were notified of this resolution, and, at the same time, informed that the committee would receive and consider any discussion of the case in writing, and proper time given to prepare for it, that either party might offer. Against this course the petitioner protested; which is filed with the papers of the committee.

Amongst the documents transmitted to the committee through the House, on the part of the petitioner, were three printed publications, one purporting to be signed by Pryor Lea, and two by the petitioner; which seem to have been intended for circulation in the district during the canvass.

Certain printed  
documents re-  
jected by the  
committee.

The committee, believing that they had no connexion with the case under consideration, and having no evidence of their publication, and there being no notice to Pryor Lea of their introduction, or of the intention to use them as testimony, rejected them.

Election-law of  
Tennessee  
stated.

The statute of the State of Tennessee, regulating elections, requires that the county courts of the respective counties shall appoint inspectors of elections, and that they and the clerks shall be sworn; and that the sheriffs of the respective counties shall hold the election by themselves or deputies; and shall procure a ballot box; for receiving the ballots, which shall be sealed up the first night of the election, by the sheriff or returning officer, putting his seal on the place for receipt-

ing tickets, and kept by the inspectors. It is the opinion of the committee, that the several elections holden at Tazewell, in the county of Claiborne, and at the precinct at Beans', in Powell's valley, in said county, and at Knoxville, and at McFarland's, in the county of Jefferson, and at Union, in Blount, notwithstanding some irregularities in conducting the same, have been managed by the officers appointed to hold the same, honestly and fairly and impartially, and according to the spirit and meaning of the law of the State of Tennessee, if not strictly within the letter of the statute; and that a fair expression of public opinion has been obtained at the several places referred to, with the solitary exception of the vote of John Jones, who voted for the petitioner, and who was not qualified to vote, he being under the age of twenty-one years.

1836.  
5th Congress,  
1st Session.

Report of the  
Committee of  
Elections.

The committee are further of opinion that the inspectors of the election, not having been sworn at McGinniss', in the county of Grainger, in said district, will not vitiate the whole election; and they have not thought it necessary to decide whether the votes taken at that precinct ought now to be rejected, because, if the whole vote should be rejected, it will add to rather than diminish the majority of Lea, the said petitioner having received at that precinct one hundred and twenty-two votes, and the said Lea but fifty-four; or, if the whole vote taken be given to the petitioner, still Lea would have a majority of one hundred and ten votes.

If the inspectors in one precinct are not sworn, this does not vitiate the whole election.

The committee have not discovered the slightest ground for the imputation of "perjury," or "subornation of perjury," "bribery, either direct or indirect," or "corruption," or any species of fraud whatever, either to the officers holding the election or the voters, and that a full and fair expression of public opinion has been obtained.

The committee are therefore unanimously of opinion that the seat of Pryor Lea ought not to be vacated, and they beg leave to offer the following resolution:

"Resolved, That Pryor Lea is entitled to retain his seat in the twenty-first Congress of the United States, as the Representative of the second congressional district in the State of Tennessee."

Resolution in favor of the sitting member.

*Extract from the Constitution of the State of Tennessee.*

ARTICLE V.

SEC. 8. No judge shall sit on the trial of any cause, where the parties shall be connected with him, by affinity or consanguinity, except by consent of parties.

*Extracts from the Law of Elections of the State of Tennessee, act of 23d April, 1796, chap. 9.*

SEC. 2. Be it enacted, That the sheriffs or returning officers shall, on the day and at the place for holding each

1830.  
First Congress,  
1st Session.

Sitting mem-  
ber confirmed  
in his seat.

Speech of Mr.  
Arnold.

was illegally conducted, and the seat of the sitting member therefrom is vacant." And, thereupon, the House adjourned.

Pending the debate on the next day upon this amendment, a call was made and sustained for the *previous question*, and the amendment was disposed of without any formal decision.

Upon the main question, "Will the House concur in the resolution submitted by the Committee of Elections?" the vote was—Yeas 149, Nays 30: and the sitting member was accordingly confirmed in his seat.

The following speeches, delivered in Committee of the Whole, by the parties litigant, as well as some other members of the House, will furnish a view of the grounds taken, on both sides, of this highly contested election; and will, perhaps, serve to elucidate the case more completely than the introduction of the voluminous testimony upon which they comment.

Mr. ARNOLD commenced by stating that he was not a friend to much preface to either a book or a speech; but that, after the course the present question had taken, and the indications which had developed themselves at every turn in its progress, he felt that it was due, not only to himself, but to the committee, to make a few introductory remarks before entering upon the discussion of the main points involved in the case. Independently, said Mr. A., of other considerations which I shall presently mention, I am aware that things have been so managed as to place me before this House in an attitude very unfavorable to command that respectful attention which is essential to do justice to the views I may present. I have been informed by gentlemen more experienced in politics than myself, that there is a general prejudice against all candidates who contest an election; that there is a local prejudice which adheres to the walls of this House, and which slyly and insidiously creeps in upon this floor, and whispers softly and kindly in favor of the sitting member. The members are influenced, but are not aware that the influence proceeds from this subtle prejudice. This prejudice has, therefore, been denominated by some "an involuntary prejudice, which exists among the *ins* against the *outs*." I have been told by a gentleman, venerable for his years and his hoary locks, who has had a seat upon this floor, and who has been chairman of the Committee of Elections, that the report of one of the standing committees of this House has weight with this House, and that the report of a party committee in party times has very great weight with this House. I have been, Mr. Chairman, so unfortunate on the present occasion, as not only to have the report of one standing committee, whose peculiar province it was to report upon this subject, but a branch of this question has been referred to another standing committee of this House, and both those committees have not only reported against me, but have accompanied those reports with

1830.

21st CONGRESS,  
1st Session.Speech of Mr.  
Arnold, continued.

gratuitous remarks, which were not only calculated to chill those who were disposed to look at me favorably, but were calculated to arouse the deepest prejudices, which I have good reason to fear were already lurking in the bosoms of some upon this floor. I will not say, Mr. Chairman, that these are party times, that these are party committees, or that these committees have been influenced by party considerations: but I must be permitted to say, sir, that the proceedings in this case have been of an extraordinary character, and I am told by gentlemen of experience that they are wholly unprecedented. I will abstain, at this time, from further remark upon the proceedings of these several committees, but, before I get through, I shall take the liberty of recurring to them.

When I first arrived in this city, and told my business, some gentlemen laughed at me. They said, my "memorial to Congress put them in mind of the protest which Louis XVIII issued against Bonaparte's assumption of the imperial title. Louis was in banishment, and Bonaparte was seated on the throne, with the sceptre of power in his hand."

This view, sir, presents numerous and weighty obstacles which meet me at the threshold; but, numerous and weighty as they are, they shrink into perfect insignificance when compared to an indication in this House, which I witnessed from the gallery on yesterday. I applied, on the day before yesterday, in the evening, at the office of the public printer, to know if the documents and testimony in the case had been printed. He informed me he had not printed them, but would endeavor to have them out by 12 o'clock yesterday. I expected to be furnished with a copy of these documents, but was not. These documents, as I was informed, were laid on the tables of the members, for the first time, after the House met on yesterday. Just before the hour arrived for taking up the question, I succeeded in borrowing a copy of the documents, which I found to contain eighty-five octavo pages. I was desirous to read the testimony myself, to see whether it was fully and correctly printed. I was also very desirous that every member of this House should be fully in possession of all the material facts upon which the case rested. To this end, I sent for the gentleman from South Carolina, (Mr. NICKOLLS,) who has been so kind as to extend to me a helping hand in the incipient and formal proceedings in this case. I stated briefly to him the facts, and he promised to ask for a postponement until this day. When the case was called up by the chairman of the Committee of Elections, the gentleman from South Carolina moved a postponement until to-day, for the causes I have stated. I thought that every honorable gentleman upon this floor would be in favor of this postponement, because I knew that if the members had nothing else to engage them, from the time the documents were laid upon their tables, they could

1889.  
31st CONGRESS,  
1st Session.

Speech of Mr.  
Arnold, con-  
tinued.

not have read the testimony. I could not believe that gentlemen were desirous of taking a leap in the dark: but, to my utter astonishment, when the honorable Speaker propounded the question to the House, on the motion of the gentleman from South Carolina, to postpone the consideration of the question until to-day, I heard a very strong negative voice; indeed, sir, so strong, that the honorable Speaker had to ask for a division of the House, to know if the motion to postpone was not lost. This desire, manifested by so large a portion of the House, to decide a question of such magnitude without testimony, I must confess, staggered me. It causes me, sir, to appear before this House with fear and trembling. Upon a review of these circumstances, they look sufficiently numerous and ponderous to make justice kick the beam. Indeed, sir, it has been intimated to me that gentlemen on this floor have taken up an impression that I do not expect to get along; that I am in a state of desperation, and wish only to consume the time, and trifle with the dignity of this House. If there is any gentleman upon this floor who cherishes towards me feelings like these, I beg him, in the name of that justice which he owes to himself, and which I, in the name of my much-injured fellow-citizens, have a right to expect at his hands, to discard them: for, I do assure gentlemen that, on this question, I cherish feelings of the utmost solemnity. Nothing could possibly be further from my intentions than either to waste the time or trifle with the dignity of this deliberative assembly.

The prejudices of which I have spoken, the reckless hostility which betrayed itself upon this floor, I admit, sir, are extremely discouraging. I have, however, one consolation that buoys me up; the justice of my cause, and the wisdom and fidelity of those who have to pronounce judgment upon it. Thrice is "he armed who hath his quarrel just;" and if I can have the attention of the committee, I flatter myself I shall be able to show that my quarrel is just.

I can conceive, Mr. Chairman, of no question of higher importance than the one now presented for consideration. It is a question which involves the independence and purity of the elective franchise. In a country like ours, where all offices are filled, either directly or indirectly, by popular elections, the purity and independence of the elective franchise cannot be too vigilantly guarded. The elective franchise is the fountain of our liberty, and we should be extremely careful not to permit it to become a "pool for foul toads to knot and gender in." In Tennessee, the freemen look upon the ballot box as the sacred depository of their dearest rights. The functions of the ballot box on the body politic are frequently assimilated to those of the heart on the human system. When the heart is sound and elastic, it propels life's warm gush into all the extremities of the system, nourishing, invigorating, and sustaining it; but when the

heart becomes the seat of corruption, it loses its healthful elasticity, and, instead of life and animation, it sends out putrifying disease, which spreads itself through to the whole system, and death quickly follows. Just so with the body politic; when the ballot box becomes corrupted, our liberties are diseased, and dissolution hurries upon our institutions.

1830.

21st General Assembly,  
1st Session.Speech of Mr.  
Arnold, continued.

I will now, Mr. Chairman, proceed to the law and the testimony.

[Here Mr. Arnold desired that the Clerk should read from the Tennessee law the second section, ninth chapter of the act of 23d of April, 1796, which is in the words following, to wit:

“That the sheriffs or returning officers shall, on the day, and at the place for holding each respective election, be provided with one box for receiving the ballots for Governor and members of the General Assembly: the returning officer or his deputy shall receive the tickets in presence of the inspectors, and put each ticket into the box, which box shall be locked, or otherwise well secured, until the election shall be finished. The returning officer shall, at sunset of the first day, and in the presence of the inspectors, put his seal on the place to be made for the reception of the tickets, which shall continue until the election shall be renewed the succeeding day; and it shall be the duty of the said inspectors to take charge of the box until the poll is opened the next day, and shall then be taken off in presence of the inspectors.”

Section of the  
election law of  
Tennessee.

The section being read, Mr. ARNOLD proceeded:]

It is very perceptible, Mr. Chairman, to the most common observer, that when the Legislature of Tennessee enacted this law, they intended to throw a strong guard around the elective franchise. This law, sir, contains very special, and I think very explicit provisions. Those who enacted it knew something of the frailty of human nature; they knew something of political strife; they knew the length to which the blind zeal of partisans would sometimes hurry them; they anticipated just such a case as the present. Before I proceed to apply the law to the testimony, I will illustrate the necessity of a rigid execution of this law by a supposed case.

Suppose, then, that in some district in Tennessee where this law prevails, and the second congressional district will make as apt an illustration as any; I say, sir, suppose, then, that in the second congressional district of Tennessee, a man is brought out for Congress who has been dandled from infancy to manhood upon the lap of kind fortune; suppose him to have a numerous and wealthy train of family connexions; suppose the leading politicians and newspapers puff him into consequence, and place him in bold relief before the public eye; suppose him to be supported by the whole banking influence in the district, (and in the district



1830.  
21st Congress,  
1st Session.

Speech of Mr.  
Arnold, con-  
tinued.

of which I am speaking, there are two banks in Knoxville, and a bank agency in every county in the district; and, for loaning money, equally if not more potent than the banks themselves in elections;) suppose him to be supported by six sheriffs out of seven in the district, with a host of deputies, spread like the locusts of Egypt through the land, with tax books and executions in their hands; suppose him to be warmly supported by a United States Senator who resides in the district, and who has an overshadowing influence, with but few scruples about the means so the end is obtained, and who has all his lifetime been in the habit of dictating to those around him how to vote; and, to cap the climax, suppose this candidate be mounted on some popular hobby, and rides under whip and spur through the district—I say, sir, suppose, in the face of all this machinery and preparation, in the face of this numerous and wealthy family connexion, in the face of all this banking influence, and in the face of almost the entire official influence of the district, the people should have the audacity to bring upon the turf the son of the most humble citizen among themselves, do you not think, Mr. Chairman, that they would stand in need of the strong arm of the law to shield their rights from outrage and aggression? Do you not think, sir, that in such a case the rigid execution of the law would be the best? Nay, sir, do you not think it would be the only certain security the people and their candidate would have? It seems to me it would. The case under consideration is fully as strong as the case I have supposed, and all must see the imperious necessity of a rigid execution of the law, in the spirit if not in the letter. The facts of this case will show, I believe, that the law ought to be executed to the very letter. But it is not necessary to ask for that in the present case. We only ask, sir, to have the law executed according to the *broad spirit*. We do not stickle upon points of mere formality, but only upon the substance and the spirit, without which the law is a dead letter. No power on earth, except Congress or ourselves, has any right to alter or amend our electoral laws. Congress has abstained from the exercise of this power—has passed no law on the subject of elections. The law of Tennessee is therefore the paramount law of the land, and by that law the present momentous question must be decided. Having two days of election in Tennessee, and voting by ballot, the ballots given on the first day remaining one whole night in the box without being counted, it was foreseen by those who framed the law, that in times of high political excitement this would hold out a very strong temptation to rifle the ballot box. Unprincipled political partisans would devise some plan by which they could get possession of the ballot box. To prevent this, and to make this sacred depository of freemen's suffrages perfectly secure, the Legislature enacted that the sheriff should provide one box, which should

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be locked; or otherwise well secured; upon which box, at the close of the first day's election, the sheriff should put his seal, and that the inspectors of the election, three in number, (who, by a previous section of the same law that has been read, are to be appointed by the county courts,) shall take possession of the box, and keep it until the poll is opened the next day, at which time the sheriff, in presence of the inspectors, shall take off the seal.

By the eighth section of the chapter from which the second section has been read, it is enacted "that the inspectors and clerks of every such election, as aforesaid, shall, in the court-house, before they proceed to business, swear (or affirm, as the case may be) faithfully to perform their respective duties at such election, agreeably to the constitution and laws of the State."

It is very perceptible, from the language which the framers of this law have employed, that they were extremely suspicious even of those whose duty it is made by the law to hold the elections; and who are required, before they enter upon the discharge of this very high function, to superadd to their moral obligations those of religion. They are required to take an oath. And even then, sir, the framers of the law thought it possible that these men, thus restrained by moral and religious obligation, might still be tempted, in some way or other, to do violence to the ballot box. They would not agree that the sheriff should have possession of the ballot box for one instant, out of the presence of the inspectors. They also manifested distrust of the inspectors, because they make it the duty of the sheriff to put his seal upon the box before the inspectors take it from public view. Three inspectors are appointed, and the law requires that the inspectors, not one of them, but that *all* of them, *shall take charge* of the ballot box, and keep it until the poll is opened the next day. It is made their duty to do so. Three are necessary, that they may be a check upon each other, and the seal of the sheriff is required as a check upon the whole.

Now, sir, I assume that if it can be shown that at any one place of voting where the sitting member received more than 217 votes, the majority he claims in the whole district, or if he received 109 votes at any one place where any of these essential requisites of the law were violated or were dispensed with, although unaccompanied by a single badge of fraud, the election ought to be set aside. We must have some rule of action that is general and certain. This fundamental law of the land was intended to furnish this rule. If a violation of this rule then, in one of these essential particulars, be tolerated by this House, I ask, sir, where we shall stop. Is not the door opened to fraud? and are not the floodgates of corruption and venality hoisted upon us? and is not the purity of the elective franchise in imminent danger of being swept entirely away? It unquestionably is.

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Let us then apply the testimony in this case to the law, and see how it stands. In doing this, sir, I shall not merely show that the law was violated in nearly all of its essential features, but I shall show that these violations were accompanied with most aggravated circumstances of fraud, that point unerringly to a violation of the ballot box. I will commence at the Tazewell precinct.

It is proved by Mr. Rose, (see Doc. No. 4,) that a few days before the election he had heard that sheriff Hunt had said that I should not get a majority of votes in the county of Claiborne. He asked Hunt if he had said so; Hunt replied he had said so—he said so yet—and he would be d——d if I should. Col. Gray Garret proves, in substance, the same thing, (see Doc. No. 5.) Col. Garret, Jonathan Mays, Esq., Nathan Perry, and William M. Bee, all prove, (see Docs. Nos. 5, 6, 7, and 14,) that on the first evening of the election, while Hunt was sealing the ballot box, some of my friends desired that it should be well sealed and given to the inspectors. Hunt asked why he should not keep it himself. Because, said the voters, it is not the law, and it is not right for you to keep it. Hunt replied that the box was his, and he would be d——d if he did not keep it himself. He immediately picked up the box and carried it to the store of Hugh Graham & Co., who are proved to be violently my personal and political enemies, and one member of the firm is proved to have had several bets on the election. (As to this point, see Docs. Nos. 5, 7, 8, and 9.) Nathan Perry, one of the witnesses that I have mentioned, proves (see Doc. No. 7) that he was present the whole time, from the sealing of the box until Hunt took it to Graham's, and he says he heard the inspectors give no consent that the sheriff might take the box there. The other witnesses who were present at the sealing of the box, and who heard Hunt say he would take it, all swear they heard no consent given.

My friends, Mr. Chairman, knowing the sheriff's personal and political hostility to me, having heard of his threats that I should not get a majority of votes in that county, knowing that he and his son had bets on the result of the election, and seeing him taking the ballot box to deposite it with the Grahams, who they knew were my implacable enemies, and knowing, too, that a member of that firm had bets on the election, were much excited, and went to the judges and remonstrated against such conduct. The inspectors became satisfied that the law made it "*their duty to take charge of the box.*" They consulted among themselves, (see Doc. letter F,) and concluded, as there was so much excitement about the box, they would go and get it again. They went, and met Hunt and Graham coming out of the room where the box was put away. Hunt said he had put the box in a trunk and locked it, had the key himself, and that Graham had the key of the door. Now, sir, an inquiry suggests

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itself here. If Hunt had taken the box so reluctantly as some of his partisan witnesses swear, why did he not give to the judges these two keys when he met them in quest of the box? They certainly could have packed the keys home if they could not the box. If the judges had examined the trunk, and had seen it was locked; if they had seen that all the doors of the house were locked, and had taken possession of the keys, why, then, sir, Hunt and Graham & Co. might, with some propriety, insist that all was fair. But, although Hunt, according to some of his witnesses, spoke of the excitement which had been produced by his threats, and did not want to take the box on that account, yet, when he met all the judges together, and they in quest of the box, he tells them it is locked up, but never once offered them the keys. When the people became so much excited about the manner in which the box had been disposed of, and had prevailed upon one of the judges to go and demand the box of Hunt, which he did, Hunt would put himself to no further trouble about it; but, after long persuasion, "he seemed to express a willingness to give it up," if he could find two of the judges together. The inspector, although urged by the voters to get the box, had to desist and go off without it. (See Doc. letter F.) After the sheriff knew the inspectors had left town, he then pretended he was hunting them to give them the box, if he could find two of them together. This, sir, is a beautiful state of things. A man who is wholly prohibited by the law from taking charge of the ballot box, gets it into his possession, and refuses to surrender it to him whose sworn duty it is to keep it. Now, sir, if he had taken the box at first, contrary to his own will, as some of his *straw* witnesses swear, and if he had not much desired to retain possession of the box, from some foul motive, here was another opportunity of exonerating himself and his friend Graham from responsibility. The fact is, if Hunt did manifest the reluctance which his chosen clerks and hired judges ascribe to him, it was only more securely to deceive the enraged voters who were looking on. The circumstance that Graham's house had heretofore been the place of deposit for the ballot box, and which seems to be much relied upon to show there was nothing wrong, does not tend to prove that at all in my estimation, but the contrary. Suppose the fact to be as insisted upon, that Graham's house had been the place of deposit frequently for the ballot box; that Hunt knew this fact; that he was desirous either to rifle the box himself, or get somebody else to do it, would not his thoughts naturally be turned to this old house, as the most opportune place in the world to perpetrate this dark deed? this outrage upon the dearest rights of the freemen of Claiborne county? And so far from imparting innocence to the transaction, it goes very far to show its guilt. He would reason—"the box has been deposited there before;

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and it will excite no suspicion for it to be deposited there again." From all the circumstances, I have no doubt that Hunt, intending to execute his threat, had determined that, whether the inspectors were willing or unwilling, the box should be deposited in Graham's old store; and I have as little doubt that there was an understanding between Hunt and Graham to that effect. Graham took the box very willingly; and although he knew that the voters were excessively offended at his having possession of the box, yet he retained it. The fact is, Mr. Chairman, if any of the inspectors gave their consent that the box might go to Graham's, they were bullied into it by the sheriff; for the witnesses all swear that while Hunt was sealing the box, and before the inspectors had said one word as to its disposition that night, Hunt swore the box was his, and he would be damned if he did not take it himself. One of the judges was Mr. Lea's friend; he, of course, was willing that Hunt and Graham should have charge of the box. Another of the judges was negotiating with Hunt, or was already bought up, under the pretence of going to Knoxville, as messenger, to take the news to Mr. Lea. He, of course, was afraid to offend Hunt, thinking that, if he did, he would lose this job. The third inspector is a very timorous man, not inclining to take responsibility upon himself that he saw others shifting off. He is, moreover, a near neighbor to the sheriff, and did not like to offend him. John Brock, Esq., one of Mr. Lea's witnesses, positively swears (see Doc. letter H) that he never did give his consent for the box to go to Graham's; that he did not hear the other inspectors give any consent. Ten or twelve minutes after the sheriff had taken the box to Graham's, he and the other judges went after it. He then said he reckoned it was safe; the other inspectors made no reply. It is proved (see Doc. No. 12) that two of my friends were willing and offered to act as clerks of the election, and they, sir, could not have been less competent than those who did act; yet the sheriff refused to appoint them, and took particular pains to appoint three men that were known to be the particular friends of my opponent. Contrary to all usage, he held the election in a small jury room, where but very few of the voters could see what was going on. There was a proposition made on the first evening of the election, by one of the specially elected clerks, who felt that he had been brought there to do some dirty business, to count out the votes, see how things stood, and keep it a secret. The sheriff was too old a fox for this; he had rather trust one man with a secret than six. On this proposition he is represented to have made quite an eloquent and patriotic speech. "When he counted out the tickets," he said, "the door should be opened, and the tickets counted in the immediate presence of the whole people." Very submissive to the laws now, sir; but in the twinkling of an eye afterwards, when he had gotten



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hold of the ballot box, (in positive violation of the laws, too,) he refused to surrender it to one of the judges whose sworn duty it was to take charge of it, and who demanded it of him in the name of the people. No, sir, this blustering about fairness, about opening the door, and counting the tickets in the presence of the whole people, was all intended for deception, and to hoodwink the people: The pliant tools he had about him were willing, no doubt, to act their parts, but the sheriff only wanted them in case of an emergency; in case he could get no better opportunity, a good deal could be done in setting down and adding up tallies; or, in the sequel, if any suspicion should rest upon the sheriff, they would make most excellent witnesses to swear him and themselves clear; to tell what fine speeches he had made, and how fairly he had acted, and how reluctantly he took charge of the box. He had possession of the box now though, and he had no immediate use for his clerks. He was not desirous of making a record of what he intended to transact that night. No, sir, he and his friend Graham, in a back room, with a dark lantern, secured from every eye but that of Heaven, could do what they desired to be done without the aid of "*blat-tering*" clerks. It is proved (see Doc. letter M) that after the votes were counted out, the polls were purged, which is another gross violation of the law. The same men who received votes as *legal*, afterwards cast them out as *illegal*, when it was impossible for them to know for whom these votes were given.

There is one other circumstance, and which has been merely hinted at, attending the election at the Tazewell precinct, to which I wish to call the particular attention of the committee. I consider it, sir, (and it is so considered by many people in Tennessee,) as a case of direct bribery by the sitting member himself. What is it? Why, sir, it is proved by John Coudray, and by Col. Garret, and admitted on cross-examination by Mason and Hunt, (see Docs. Nos. 4 and 5, and letters F and L,) that; on the first morning of the election, Hunt, as the authorized agent of Mr. Lea, employed John Mason, one of the inspectors at Tazewell, as messenger to take the result of the election in Claiborne county to Knoxville; and Mr. Lea was to pay, according to some of the witnesses, any thing the messenger would charge—according to others, he was to pay any reasonable charge. It is proved that he did go to Knoxville as messenger, and that Mr. Lea made him satisfactory compensation for his services. It is also proved by the same witnesses, that it was owing to this bargain with the sheriff, that the inspector was so seized with the fidgets, that he could not agree to stay and keep the ballot box as he was sworn to do; but he must go home that night to notify his family that he was going to Knoxville on Mr. Lea's business, and was to get any compensation he would charge. Now,



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upon this statement of facts, several considerations present themselves. 1st. Why was Mr. Lea so desirous of getting the news from Claiborne county, that he would agree, in these times, when money is so scarce in the country, and so very scarce with some particular gentlemen, to give such extravagant wages? The news too would have travelled voluntarily to Knoxville in a day or two at furthest, the distance being only forty-five miles. And hurrying the news to Knoxville could not make a difference of one vote in the district, because the elections all begin at the same time, and end at the same time. What good was to result then from taking the news to Knoxville by express? None, except that it afforded a pretext for tampering with the judges.

2dly. Suppose, for the sake of argument, that it was material for an express to be sent to Knoxville to carry the news, is it possible that no one in all Mr. Lea's ranks could be found suitable to ride express, when they were to be so well paid too? Was it natural or consistent with justice, that those who had been faithfully struggling in Mr. Lea's cause, should now be entirely overlooked, and those who opposed him bountifully rewarded? 'This would be truly "muzzling the ox that treads out the corn."' No, sir, this is not the way honest people do. Mr. Lea and myself were not upon terms even of common civility. The most bitter state of hostility existed between us, and our friends cherished pretty much the same feelings. His friends abused me, and, by way of retaliation, my friends abused him, and our friends frequently abused each other. If I had been going to employ a messenger, it would have been the very last thing of which I should have thought, to overlook my friends who had been zealously and faithfully struggling to promote my interest, (and particularly too when I was going to pay high wages,) and employ one from the ranks of my enemies. No, sir, this is not the way, unless we want to tamper with our adversaries, and then it is exactly the way. But,

3dly. Suppose there is nothing unnatural or unjust in Mr. Lea's overlooking all his own friends, and travelling into my ranks to employ a messenger. Is it not very strange that he could not find in all my ranks a man that would do to ride express, until he *stumbled* upon one of the inspectors of the election, and that, too, at a precinct where it was believed I was getting almost a unanimous vote; and that, too, one of the three or four precincts in the whole district where I had a majority of judges? If he *must* come into my ranks to employ a messenger, he could have found hundreds who were as well, if not better qualified to ride express, than the inspector who was employed. But it is said, Mr. Chairman, that although this is a dark and unaccountable transaction, yet it cannot be considered as bribery, because the amount paid by Mr. Lea to the inspector, who gave up the ballot box, was too inconsiderable. It is true, sir, that

we are only able to prove that Mr. Lea gave him six dollars, or thereabouts, but how much more he or some of his friends gave him, I am not able to say. But, sir, I say it matters not as to the amount, so it had the effect to move and operate upon the inspector. If a man be killed, sir, it is not material whether it be by a stone from the sling of a strippling, or whether it be by a thunderbolt, hurled by the right arm of great Jupiter himself. If you wish to physic a patient, sir, and half a grain will do it, why give him a whole one? Or, sir, if you wish to bribe a man, and you can do it with a penny, why give him a pound? So, sir, I say the amount is wholly immaterial. After the excitement which had prevailed in the district about the bribery of Senator Green by Senator White, they would necessarily be a little cautious, and would endeavor to veil the transaction, and give it some innocent name—such, for instance, as “employing a messenger to take the news.” It could not be expected that the inspector would be directly approached, and a five dollar bill offered to him, if he would surrender the ballot box into the hands of the sheriff, Graham & Co. No, no, sir; as I said before, the sheriff is too old a fox for that. Sir, I say, when this transaction is divested of the mist that is attempted to be thrown around it, it leaves a naked, a direct and palpable case of bribery, and can properly be called by no other name.

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Now, sir, what is the answer given to these repeated violations of the spirit of the law, accompanied by circumstances so aggravated in their character, and pointing so directly to a violation of the ballot box? Why, sir, I am told, in the first place, that I received a majority at Tazewell, where these violations took place. Now, sir, I contend that I might have been robbed, on the first day, of two hundred votes, and still have the majority allowed me on that day. It is proved, (see Doc. No. 5, and Doc. letter G,) that, on the first day, it was contended by my friends that I was getting a very large majority. At this place of voting, there were, on both days, something upwards of seven hundred and fifty votes polled; about six hundred of these were given in on the first day. Judging, on the second day, from the same facts which they judged from on the first day, my friends said it was a very close election. It turned out, on that day, that they made a very accurate judgment; but, the first day, they missed it widely. Public expectation was much disappointed at the smallness of my majority on the first day; but every body agreed as to what would be the result on the second day, and all were satisfied with it. Now, sir, the sheriff knew that my friends were excited; that they would turn out almost unanimously on the first day. How easy would it be for him, then, to give the signal to Mr. Lea's leaders, and tell them to hold up, and not vote until the second day? Let nearly all the votes that go in on the first

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day, be mine ; he and his coadjutor, Graham, could then change two hundred votes from me to Lea, which would make a difference of four hundred at that place, and still leave me the majority that was given to me. They rally all their forces on the second day, and come very close to me ; indeed, one of their witnesses says they expected to beat me on the second day. They then argue, that, as I got a better majority on the first day, than I did on the second, why, it is conclusive that the box was not robbed on the first night, and all is fair.

One other answer given by the committee, and upon which they seem to rely very much, to show that the box was not robbed on the first night, is this : They sapiently say that as there was the same number of votes counted out of the first day's box that were given in, it is very conclusive that there were no votes changed. Now, Mr. Chairman, I object to this reasoning of the committee, because *they* found their argument upon the existence of a fact which I say, sir, is nowhere proved ; at least, if it is proved, I have nowhere seen it, and I would take it as kind in any member of the committee to point out the witness who proves that the same number of votes were counted out that were given in on the first day. But admit the fact, and what does it prove ? Nothing. Is it possible that any member of the committee could think that the sheriff would take out two hundred of my tickets, and not replace them with two hundred of Mr. Lea's ? Why, sir, " a fool as gross as ignorance, made drunk," would not be guilty of such folly as this. No, sir, for every one of mine taken out, one of Mr. Lea's would be put in. And so no matter how many tickets were changed from me to Lea, yet the number in the ballot box would be the same, and correspond as well with the poll-book as ever.

But the most conclusive and satisfactory answer seems to be, that these men, who have violated the law in letter and in spirit, are all honest and honorable men, and, therefore, are not to be restrained by the mandates of the law. Yes, sir, and although the law requires that three sworn inspectors shall on the first evening of the election take charge of the box, yet, as the sheriff is an honest man, that is, he is not proved to be otherwise, he may take the box even by force from the inspectors, and deposite it with another of his partisans, who is not upon oath ; but as they are all honest men, say the committee, you must prove a positive robbery of the ballot box before we believe it. Here, sir, is an impossibility required, and shows most forcibly the necessity, whether men are honest or dishonest, of having the law most rigidly executed. Sir, I will illustrate this position by adverting to an historical fact which has been often quoted, and always admired as a fine instance of judicial wisdom, independence, and fidelity, even in those days of virtue and integrity when Cato was at the zenith of his glory. An

advocate was urging the cause of his client before one of the Roman prætors. He was able to prove a material fact by one witness only, when the law required two; but he insisted before the judge, that his witness was a man of such strict veracity and such high honor that he filled the requirements of the law. "No," said the judge, "where the law requires two witnesses, I will not be satisfied with one, if that one were Cato himself." So we say on the present occasion, the law requires and makes it the *duty of three sworn* inspectors to take charge of the ballot box, and we are not willing to trust *one*, if that one were Cato himself, much less, sir, will we agree that it shall be deposited with Shylock, the money-saving Jew, who feels towards us the most uncompromising hatred; who is not upon oath, or, if upon oath, he hath sworn in his wrath to do us wrong. No, sir, we demand to have the law of the land as the guardian of our rights; we will not agree that that law shall be prostrated, and we be left at the mercy of our most bitter and implacable enemies. Sir, if you deprive us of the law of the land, what security have we? What rule have we for our conduct? We are placed at the mercy of passion and of interest. We are like a ship at sea without a chart or compass, liable to be dashed against rocks, upon shoals, and into whirlpools.

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In the outset of my remarks, sir, I took this position: that if, at any one of the precincts or places of voting in the districts, where the spirit of the law had been violated, Mr. Lea had received one hundred and nine votes, then the election ought to be held as void: because his assumed majority is two hundred and seventeen, which is produced by a change of one hundred and nine votes from me to him. That abundant opportunity, at different places, was afforded by the repeated violations of the law, for making this exchange of votes, no man can deny. But, sir, we are told we must make positive proof of this change of tickets, or it will be presumed, although the spirit of the law has been most daringly outraged, that all is fair. Now, sir, these presumptions in favor of violations of the law, look, to me, as the most dangerous doctrines that have ever been broached in the land. Sir, I protest most solemnly, in the name of the free-men of the second congressional district of Tennessee, against these presumptions. What is to result from them? Why, this: A sheriff has taken an oath that a particular candidate shall not be elected. He takes the ballot box, and gives it into the hands of one of his partisans, who locks it up in one of his own houses, and keeps the key himself: he has access to the box in many different ways: he can take it out at a back door, up-stairs, or in a counting room, where no human eye can behold him: he has now an opportunity of gratifying his personal and political malice, and of subserving his pecuniary interests: he feels and knows that he is beyond the power of detection. Sir, this opportunity

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would almost tempt an honest man, uninfluenced by passion or interest, to do wrong. "Lead us not into temptation," is a most salutary ejaculation. Thus, sir, was the ballot box situated at Tazewell in the hands of a man not upon oath, but who was in a state of most rancorous personal and political hostility, and whose partner and near relative had numerous bets upon the result of the election. The result of that election disappointed all parties, (see Doc. No. 5,) and was much more favorable to the candidate in whose favor the laws had been violated, and whose friends had possession of the ballot box, than any body expected. Here, sir, positive detection is beyond the power of man. Strong circumstances, which lead directly to the door of truth, are all that can be expected in such a case. These circumstances we have, in a concatenation which points unerringly to a violation of the ballot box. It does seem to me, Mr. Chairman, that we have adduced the highest grade of testimony of which the nature of the case is susceptible. We can prove nothing stronger, sir, unless we could prove the hand of the sheriff, or some of his coadjutors, in the ballot box; and then those who are not satisfied now, would ask for further proof. They would interrogate the witness thus: Did you see him with his hand in the box? Yes. Did you see him taking tickets out? Yes. Were they Arnold or Lea's tickets? I cannot tell, says the witness: I was not close, enough to read them. Oh! well, say gentlemen, it is all stuff, then; the sheriff is not proved to be a rogue and a rascal, and we will presume every thing fair. Yes, sir, the sheriff is an honest man, and, like the King of England, can do no wrong.

I contend, sir, there is not sufficient evidence to show that the ballot box at Tazewell was *willingly* surrendered to the sheriff: but that the sort of half-way consent that some of the sheriff's witnesses prove to have been given by *some* of the judges, was evidently bullied out of them by the sheriff. But, for the sake of argument, I will suppose that the box was *willingly* surrendered by the inspectors into the hands of the sheriff. I contend, sir, that they had no such power; that the trust reposed in them by the law was not transferable to another, and that neither could they divest themselves of it, by leaving the ballot box in a situation to be violated, without perjuring themselves. It was their sworn "*duty to take charge* of the ballot box, and to *keep it* until the opening of the polls the succeeding day." If, then, the inspectors gave an express or implied consent that the ballot box might be consigned to the care of a man who rifled it, they are guilty of perjury; and surely, sir, the perjury of the inspectors cannot sanctify and make legal the robbery of the ballot box by the sheriff, or some of his agents.

Before I leave Tazewell, sir, as so much reliance is placed upon character, I must beg leave to make a remark in addi-



tion to those I have already made on this subject. There is no man, sir, that appreciates a "good name" more than I do; but, sir, highly as I appreciate it, I will not agree that it shall be substituted instead of the law of the land. This would be "treading upon dangerous ground, with faithless ashes overspread." Nothing is more fragile or uncertain than reputation. A man may stand proudly on the battlements of fame to-day; to-morrow he may be sunken to the lowest depths of degradation. Some flaw in his reputation is discovered; some smothered vice breaks out; and it is now discovered that his high and fair reputation is not built upon solid virtue, but upon an artful and hypocritical concealment of odious vices. Many exemplifications of this view of character might be given, both from ancient and modern time, but I shall content myself with one, which I think is very apposite and near at hand, I mean, sir, the wretched Watkins. What man stood higher in society for talents and unsullied reputation than Tobias Watkins? He came into public life under the administration of the illustrious Jefferson, that great reformer and apostle of republicanism. Under that administration he was not only once, but twice and thrice appointed to fill responsible public stations. No sin was laid at his door—he acquitted himself with honor. Subsequently, President Monroe, a patriarch of the revolution, appointed him to be secretary to the Board of Spanish commissioners; the duties of this appointment he discharged with fidelity and ability. When the Board adjourned, the members, consisting of the Hon. Hugh L. White, of Tennessee, the Hon. Littleton Waller Tazewell, of Virginia, and the Hon. William King, of Maine, unanimously recommended him, as I am informed, to President Monroe for the office of Fourth Auditor. This fatal appointment was also conferred upon him. In this office, for the first time in his whole career, a charge was brought against him; it was proved; a jury of his country convicted him of having embezzled the public money; he was incarcerated by the sentence of a court of justice, and he now groans in a dungeon. But, sir, suppose that in this case *character* should be substituted for *law*, Congress will then be converted into a court of honor to pass upon the reputation of all those who are engaged in administering the laws. A thousand men may swear that a man is honest and honorable, and fifteen hundred may swear that he is neither honest nor honorable; then, sir, it may be insisted that the opinion of the thousand is entitled to more weight than that of the fifteen hundred. Here, sir, must be another court established, and other witnesses brought, and thus you would be lost in a labyrinth from which you could never extricate yourself. This shows the absurdity and utter futility of relying upon character to justify violation of law.

I know, Mr. Chairman, that a good deal of my testimony is irrelevant and foreign to the case before the House. This,

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sir, was unavoidable. But very few of my friends were permitted to participate in holding the election. They consequently know but little about the particulars. I was, therefore, in many instances, compelled to swear my most bitter enemies, and to swear the most of them at random, not knowing what they would state. Sometimes I proved material facts by them; sometimes I proved nothing by them; and sometimes they struggled very hard to make out a case against me. I wish to call the attention of the committee to the character of the testimony produced by the sitting member to overthrow my testimony, and to sustain the election. Who are the witnesses? Why, sir, with one solitary exception, they are the parties themselves who have participated, directly or indirectly, in violating the laws, and who are implicated in the charge of foul play in the election.

These are the men who are brought forward as the compurgators of each other, to swear that all is fair, and that they gave me rather more than justice. Now, sir, this is a sight that sickens and palls upon the senses—a sight from which honest men must turn with loathing and disgust. I will not say that these men are not competent, but every body must admit that they are not credible. What is their situation, sir? Why, that of having the deepest interest, personally, politically, and pecuniarily. They are precisely in the situation that a man would be in, who was charged with high offences against the laws of the land; against whom the truth of those charges was brought home by a connected chain of powerful circumstances. Every man he meets scowls upon him. He feels that he is about to be overwhelmed with ignominy and disgrace. At this crisis, he is admitted as a witness in his own cause; to swear himself clear, to avert the lowering cloud which hangs over him, and every moment is threatening to empty its wrath upon his head.

Let such a man bring in his minions; his associates in crime. Let them have an opportunity of swearing away the guilt of themselves and their principal. Under these circumstances, if perjury is not committed, to say the least, it will not be for the want of temptation.

I must be permitted now, sir, to pay my respects to the Gourd—yes, sir, that gourd which the committee tell us was so carefully stopped, and tied up in a handkerchief. Yes, sir, tied up in a handkerchief. Now just think of that, Master Brook—a gourd is converted into a ballot box; the box is locked with a persimon plug, and, to make assurance doubly sure, the box is sealed with a handkerchief. Ludicrous as this subject is at first view, yet, when it is looked into, it presents matter for the gravest consideration. The inspectors who held this election were John Carr, senior, John Berry, and Isaac Vanbebber. The two former were not sworn at all, and the latter, who swears that he was sworn, had five bets upon the election. (See Docs. Nos. 4 and 8,

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and Doc. letter P.) It is proved by Jonah Moore, (see Doc. No. 15,) that, previously to the election, John Berry, the inspector who kept the gourd, expressed great dislike to me, and said he did not like me hardly well enough to do me justice. It is proved by Col. Garret, (see Doc. No. 5,) that Berry admitted that he tore up my tickets, and put Mr. Lea's in his bosom. And when asked why he did it, he said he did it to plague old Mr. Carr, one of the judges, because he was my friend. It is proved that at this precinct, the election preceding the last, I beat Mr. Lea, and that at this election he received more than two votes to my one. At this precinct upwards of two hundred votes were given; one hundred and nine votes taken from me and added to Mr. Lea, gives him the majority he claims in the whole district. Berry had every opportunity to make this exchange of tickets, and every man must admit that he had the disposition to do so. He was restrained by no legal obligation; and as to moral obligation, I believe, sir, it does not weigh a feather with him. Here was a great falling off in my vote. How is it to be accounted for? The sitting member had done nothing to increase his popularity. I had done nothing to diminish mine. No revolution had taken place in my sentiments, either as to men or measures. The first time I ever addressed the people of Tennessee as a candidate, it was brought against me as a charge that I had expressed sentiments favorable to Mr. Adams's administration. I admitted the charge, sir, and pleaded *justification*. I took then the broad ground that I have always insisted upon since. I stated in explicit and unequivocal terms that I did not believe one word of the story of bargain and corruption between Mr. Adams and Mr. Clay; that I believed Mr. Adams to be one of the greatest and one of the best men who lived at that day, and I think so still, sir. His political defeat has neither destroyed nor weakened my confidence in him, either as a man or as a politician. There is no period of my life upon which I reflect with more pride and satisfaction, than that portion which I have employed in support of the wise and virtuous administration of John Quincy Adams.

An overwhelming majority of the people of Tennessee differed from me in opinion. But the *freemen* of the second congressional district of Tennessee are tolerant and liberal in their feelings. *They* were not disposed to condemn me for sentiments that I honestly entertained about men; and as to principles, my friends and myself concur.

I would, sir, that I could pay the same just tribute to the tolerance and independence of all the leading politicians among us. But a regard for truth will not permit me to do it. There are politicians among us, leading politicians, too, sir, who would damn a man if he does not see as they see, and do as they do; if he will not sing hallelujahs, and prostrate himself, regardless of principle, before them and their idols. This,

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sir, is a state of things bad enough in a country that boasts of its freedom ; but I rejoice that it is no worse ; I rejoice, sir, that these politicians have no power over my person as yet ; for I verily believe, if they had, I should have felt the force of it before now. Yes, sir, we have Robespierres enough in this country ; proscribing and bloody in their feelings as he who made the scaffolds of France slippery with the gore of its victims. Yes, and if these politicians had had the power and a guillotine, (they have the will, sir,) my head would have been in the executioner's sack before this. I feel, Mr. Chairman, that I owe my life to the freedom of our institutions, and I am now struggling to maintain that freedom. My friends in Tennessee, sir, are the old soldiers of the revolution, and their descendants. They were on the right side then, and they have been so ever since. They hate a tory, sir. They remember King's mountain. They remember some of those who were there ; and they remember, too, on what side they were. My friends, sir, always stand ready to pay their money, to shed their blood, nay, sir, to lay down their lives, in defence of their country and of liberty. They claim the right of voting at all elections as they please ; and they deny that any inspector of an election, that any sheriff or deputy sheriff, has a right to tear up or swap their tickets until they are fairly counted out. They feel as freemen, and they are willing that I shall be as free as they are. They are too generous and noble in their feelings to deny me a privilege they claim themselves. I hope the members on this floor are as tolerant in their political feelings as my friends in Tennessee are. I cannot believe that Jackson men will vote against me merely because I was an Adams man ; nor can I believe that Adams men will vote for me on that ground. I expect the members of this House to vote upon this question according to their views of the law and the testimony, and not according to party lines. Sir, if party feelings are to be aroused, and party lines drawn, I had as well surrender the point at once ; for I perceive that the friends of the late administration are in a dreadful minority on this floor. It would be a deplorable state of things, sir, if a question which involves the purity of the elective franchise was to be decided upon party grounds. We might then begin to shudder for the fate of this country. When a country, sir, is governed by factions, each successive faction will always be more monstrous than its predecessor. A country thus governed is a wretched country, and its unhappy fate may be predicted without the gift of prophecy. But, sir, enough of this digression, and to the *gourd* once more. It is a remarkable incident in the transaction of this business, that the deposition of John Berry, who kept the *gourd*, has never been taken, although I was twice notified by Mr. Lea to take the deposition of this man. I attended both times, and his deposition was never taken. Mr. Lea, in his communication to the committee, seems to

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be apprehensive that some difficulty might arise on this point, and intimates that if, upon trying the strength of his testimony, it should, in the opinion of the committee, not be strong enough, he will still send and get Berry's deposition. If Mr. Lea can understand what sort of testimony is wanting, and can have time allowed him to write to his friend Hunt, he can get it. Just let him say to Hunt, "my dear John, my fate here depends upon the depositions of John Berry and others. You know your fate and the fate of our party in that district depend upon my fate here." Berry's deposition would come, sir, and as many others as were necessary. Yes, sir, swans would be proved black, crows would be proved white; nay, sir, in the language of our Western beef drivers, the horns could be proved off of bullocks' heads. My friends, sir, will not believe any thing else but that Berry, Vanbeber, and the gourd are the causes of the falling off of my vote in that precinct. My friends do not change without a cause, and they think the gourd was the cause of the change. They are violently opposed to gourd ballot boxes, and gourd-headed politicians. They say I don't run well in a gourd; and that they will never vote in a gourd again if they can avoid it; and if ever they vote for a gourd-headed politician, it shall be by proxy; that the sheriff shall do it for them in a secret back room, where nobody can see him.

I will now, Mr. Chairman, proceed to Knoxville. And here, sir, I am so unfortunate as to be compelled to come in contact with the honorable Senator whose name I had occasion to mention when I was before this House the other day. Sir, an attempt was made on that occasion to impress this House and the public with a belief that I desired to assail a man who had no power here to defend himself. I have felt it my duty, sir, on previous occasions, in the presence of that individual, and in the fortress of his strength, while he was unrestrained, and surrounded by his ferocious minions, to speak of him in this *same transaction* much more fully and much more explicitly than I spoke the other day, or shall have time to speak now. Sir, if we may judge from the feeling manifested the other day, it is not necessary that he himself should be here to make his defence. No, sir, for at the bare mention of his name, gentlemen rise on my right and on my left, bristled like the fretful porcupine, ready, right or wrong, to defend him at all points. Indeed, the gentleman from Tennessee (Mr. Polk) rose, under a state of excitement, and spoke as though he thought the sanctity of the gods had been violated. I feel armed in honesty, and this gasconading, sir, has no terror in it for me. It will no more vary my course than the whistling of the idle wind. As two standing committees have pronounced that these documents, which have produced so much excitement, are irrelevant to the matter under consideration, I should, on this occasion, have said nothing about them, had it not been for the gratui-

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tous remarks with which the chairman of the Judiciary Committee was pleased to accompany his report. He says, sir, without giving the facts to the public, without assigning any reason upon which his opinion is founded, that the charge is wholly groundless. An acquiescence by me, Mr. Chairman, might be considered as an admission of the correctness of that report. Justice to myself and to the freemen of the second congressional district of Tennessee, who, in common with myself, made this charge, requires that I should give a succinct exposition of the facts. In doing which, I shall confine myself to the record and historical facts of those times accompanying that transaction. Sir, the honorable chairman of the Judiciary Committee must have felt that I intended no wrong—no foul play; because I marked for publication, and desired *should* be published, the very document which he thinks so amply vindicates the motives of the honorable Senator. I knew, sir, that this document contained the very best defence which could be made against the charges set forth in my publications. Sir, I feel authorized to say that that defence was deliberately and carefully drawn by the hand of the honorable Senator himself. I was willing, sir, that he and his coadjutor should have all the advantages resulting from this specially drawn document. And I am extremely sorry that neither of the committees have felt willing that this precious document should meet the public eye. I feel authorized to say that it was drawn by his hand from the following considerations: 1st. It is a *fac simile* of the whole man—it is “*special cunning*,” veiled over with affected candor. 2dly. It is given as an editorial article in the Knoxville Register; a paper which I feel authorized to say is mainly edited by the honorable Senator himself, and particularly when I am before the people. I asked the honorable Senator, while he was upon oath, if he did not write and compose editorial and other articles for that paper. He refused to answer. I, therefore, feel authorized to take this refusal as an affirmative answer, and shall so consider it. I commend to the perusal of the committee the deposition of this gentleman, as a matter of curiosity. It will be found in document No. 16, and the last deposition in that document. To my second question he put in a special plea of justification. To my *fourth* question he put in a special demurrer; and there the pleadings ended.

In 1827, Senator White and Senator Green met at Kingston, on their way to the Legislature, which was about to meet at Nashville. While at Kingston, Mr. Lea advanced to Senator Green \$1,077 as a loan; and to secure the repayment of it to himself, he took a deed of trust or mortgage from Green upon a tract of land. Senator White and Senator Green went jogging on in company from Kingston to Nashville. Soon after the Legislature met, and about two years before White's time was out, Senator Green introduced a resolution



to bring on the senatorial election ; which resolution was carried, and Senator White was elected for eight years, when the constitution declares they shall be elected for six only. Most of us in Tennessee, sir, think that six years is too long ; that Senators are too apt to forget their dependence on the people, and to become proud and aristocratic in their feelings ; and if six years had this tendency, much more will *eight* have it. The intelligent and honest part of the community thought this a violation of the constitution. And I believe now, sir, Tennessee has but one Senator in Congress. I believe every vote Senator White gives is a perfect nullity. But, sir, to my purpose ; things passed along pretty smoothly until about the time when it was necessary for Mr. Lea to commence his journey to this place. One hungry creditor wanted his debt secured before he left home. Another wanted his, and another and another, until they were like to devour him. It became public, sir, notorious, that Mr. Lea was executing mortgages and deeds of trust, to stay the ravenous appetites of those to whom he was indebted. The people began to inquire—"how is this thing?" How is it that Mr. Lea, a month or two ago, was able to loan so large a sum of money to Senator Green, and is now wholly unable to meet demands against himself!!! No answer could be given. The affair was shrouded in mystery, until Mr. Lea, while he was at this place, commenced an attack upon Col. Williams, one of our private citizens. Col. Williams, in repulsing this attack, alluded to this case of Green's, and charged Mr. Lea with having a private interest at variance with the public interest over which he had been placed as a sentinel. Mr. Lea felt that he was getting into the narrows, and in order to avoid Scylla, he dashed himself against Charybdis.

The land upon which it seems Mr. Lea had taken a lien from Green, is known in Tennessee as a reservation tract. The State has suffered great pecuniary loss by reason of the decisions of the State courts upon this class of cases. A majority of the Legislature thought the decisions of the State courts were erroneous. They, therefore, instructed their Representatives in Congress to endeavor to have a law passed, enabling the State to have these causes adjudicated by the Supreme Court of the United States. Mr. Lea had omitted to take any steps in compliance with these instructions. To show that he was not interested against the State, he had to show that he was not interested in the transaction with James I. Green. This he roundly asserted. He said he was only a *nominal* party in the transaction ; that he had only consented that another might loan the money in his name. This still perplexed the case with further difficulties. There was nothing, to be sure, in this, at first view, that looked very criminal ; but the *freemen* of the district disliked the idea very much, that their Representative had become the *tool* of a money jobber. The more mystery that was thrown around this

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transaction, the more curious the public became to fathom it. At last it was *whispered* that this \$1,077 had really been used by Senator White, in the name of Representative Lea, to buy up Senator Green. It presently became the common talk. The people began to connect it with Green's resolution to bring on the election, and with White's having been actually elected for eight years instead of six. They began to scowl upon it, and to denounce it as a dirty and corrupt transaction. Col. Williams, in a publication of his, alleged that it was the first time *money* had been *used* in the politics of Tennessee. Indeed, such was the general indignation on this subject, that the Hon. Mr. Lea and the Hon. Mr. Green felt themselves called upon to make vindicatory publications. And the whole drift of all their publications was evidently designed to lead public attention off from Senator White, and to fix it upon some man in McMinn county. Every man merely reading these publications, would have said that the money-lender lived in McMinn county. The public, by this time, got in hot pursuit. They were determined to ferret out this money-lender, to unravel this mysterious transaction. Mr. Lea and myself were engaged in a most bitter controversy, both written and verbal. The freemen told me to have it out, to catechise him publicly from the stump, on the subject of the James I. Green transaction. I did so in Knoxville, in the presence of Senator White. I asked him explicitly if Senator White was not the man who had advanced the money. He refused to answer, and we came well nigh having a mob. Subsequently, in my circular No. 2, I made the same charges; propounded the same interrogatories; and, in the name of the people, called upon Senator White to come out with the facts. In Mr. Lea's next pamphlet he refused to answer. Senator White did nothing but abuse me through the streets, and in the columns of the Knoxville Register. At last things waxed warmer and warmer. I was about writing my circular No. 3, when a number of the most respectable citizens came to me, and told me to make the charge explicitly, that the Hon. Hugh L. White was the man who had advanced the money to Green, and to pledge myself to prove it, if it were denied. I knew these citizens to be men of unimpeachable veracity, and possessing lofty and honorable sentiments. They pledged themselves to me, if the charge should be denied, to prove it by a gentleman who, for unbending integrity, strict veracity, and honorable deportment, stood second to no man in the State. I made the charge, roundly and unequivocally, and pledged myself to prove it if denied. In the next Knoxville Register, after the issuing of my circular No. 3, the famous production which the honorable chairman of the Judiciary Committee considers as completely exculpating the Senator, made its appearance under the editorial head. And it is pretended, sir, in that article, that they

had prepared that part of it which contains the confession of facts; and I believe, sir, they say it was in type before they saw my circular No. 3. Now, sir, as to this part of the statement, there is not a man in Tennessee that believes it. No, sir, not one. The truth is, they saw my circular No. 3; they saw that I reiterated the charge, and sent it home to Senator White. They saw that I pledged myself to prove it, should it be denied, by unquestionable testimony. They saw that truth had driven them to the wall, and that a refusal to answer now would be taken as conclusive evidence of guilt. They, therefore, came skulking out under the editorial head of one of the most venal and abject prints in the land. This has been adopted by Mr. Lea as his own confession in this affair; and I feel at liberty so to consider it; and, when connected with some transactions in this election, I think it ought to have great weight with this House.

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Now, sir, what are the defences set up by Senators White and Green, and Representative Lea? Why, first, it is said the \$1,077 were *loaned*, not given, and therefore it is not bribery. Secondly. It is said that Senator Green before his election pledged himself to vote for Senator White, and that he could not have been elected without that pledge; and, therefore, there was no necessity for bribing him. Thirdly. It is said that Senator White had no opposition, and, if he had had opposition, such was the magnitude of his name, and such his towering popularity, that he would easily overcome any competition; and that, therefore, there was no necessity for bribing. Now let us examine, sir, briefly these several defences, and see whether they are able to stand alone, or whether they can be harmoniously combined.

As to the first proposition, I say, sir, it is wholly immaterial whether the money was *given* or *lent*. A man may be as easily and corruptly influenced by a loan as by a gift. If the loan stimulates and brings the borrower under obligation to the lender, it is just as bad as if he had been influenced by a donation.

As to the second defence, that Senator Green pledged himself before the election, &c. to vote for Senator White, &c. Taking this view of the case, admitting Green to be pledged, and all that, it makes Senator White's conduct extremely fastidious, and even squeamish. What, sir, I have a friend, a devoted friend. He is pledged to vote for me, and all the world knows it. He is about to be overwhelmed with pecuniary embarrassment. He is about to be sold out, stock, lock, and barrel. He sends a friend to me, who describes his wretched condition. I have the money in my fob, sir, but I shake my head and say, "It will not do for me to loan the money in my name; it will not do to let my friend, who is *pledged* to vote for me, know that I advanced the money, because he will feel that he is bribed. At any rate, although the world knows he is my friend, and pledged to vote for me,

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they will say it is bribery. No, no, this will not do. I must stand behind the screen, and put my puppet forth to the world. I will do in secret what I will not do in public.” This, sir, is precisely the conduct of the honorable Senator; and I ask, Mr. Chairman, if this betrays that pure, delicate, and unsuspecting integrity of motive which gentlemen on this floor have ascribed to him. No, sir; and an honest and unsophisticated man would never have thought of, much less have been alarmed at, the idea of bribing his own friend. He never would have thought what the world would say about it; but, actuated by the generous and noble impulse of relieving the distresses of his friend, he would “straight-way” have handed over the money. The honorable Senator, sir, on this occasion was like Sambo’s tree, “he so straight dat he bend a little ober.” The reason for concealing this transaction, which the honorable Senator and his coadjutors wish to impress upon the public, is, that the loan might have no influence with him in giving his vote. Now, as I before mentioned, if Green was already pledged to vote for him; if he had no opposition; or if his popularity was so great as to cast into the shade all opposition that might stand in the way; I say, sir, if either or all of these circumstances be true, concealment was wholly superfluous. But even admitting, for argument’s sake, that concealment had been at any time proper, it surely ceased to be so when the cause for it was removed. The alleged ground of concealment was the fear that, if Green knew the source from which he had been relieved, it might have an undue influence upon his vote in the senatorial election, which was to come on shortly thereafter. So soon then as Green gave his vote, the reason for concealment was removed. After this, then, why did Senator White and the parties concerned endeavor to conceal from the public the truth of this transaction, when that public loudly demanded it?

I can give better reasons than these, Mr. Chairman, for the advancement of the money, and for the concealment, too, sir. It was stated in one of Mr. Lea’s publications on this subject, an extract of which is made in my circular No. 3, which is on the Clerk’s table, that Thomas L. Williams, who, as a lawyer, had this \$1,077 to collect from Green, was using collateral means to influence him politically; and to prevent Williams from operating upon him, this \$1,077 was advanced. This single admission proves, beyond the possibility of contradiction, that they believed Green corruptible, if not already corrupt, and that his politics could be operated upon by pecuniary considerations. He is a man said to possess fine talents; but all accounts in Tennessee agree in saying that he is wholly destitute of principle. Senator White, sir, had no faith in Green’s pledges, even if he made them; and Senator White believed he might have opposition, and overwhelming opposition, too, sir. In 1827, Col.

Williams was a candidate in the Knoxville district for Senator to the State Legislature. Senator White mounted the stump against him, and used his most potent influence to have him defeated. But Williams, although opposed to Gen. Jackson, succeeded by a triumphant majority. I was a candidate at the same time for Congress, and although I was an avowed Adams man, I came very near being elected. My friends then believed that I was juggled out of the election. The farther out from Knoxville, the better I run too. The judge saw this. He saw a great many of Col. Williams's old friends elected to the Legislature. He remembered that, in 1823, after trying all East and West Tennessee, to get a man to beat Williams, they could not get one that would begin to run, until they brought the old war-horse upon the turf; and then, sir, it took hard whipping. And I verily believe, Mr. Chairman, if Gen. Jackson had not been previously nominated for President, Williams would have beaten him easily; but Jackson's friends said it would not do to have him beat for Senator, for, if he was, it would blight his prospects for President. And, in this way, sir, they whipped him through—only ten votes ahead though, sir. Senator White knew that Col. Williams's talents were commanding; that his manners were conciliatory and pleasing, even to his enemies. Senator White felt that his course towards Col. Williams had been an unpardonable one. He could expect nothing but opposition from him. By a moment's reflection, and a single glance of his eye, he saw the obstacles that lay by the way. Trepidation seized upon him, and he began to fortify himself for the battle. Green was doubtful; he must be secured. He was secured, at \$1,077, too; and how many more were secured in the same way, I am not able to say. I regret, Mr. Chairman, that it has been necessary for me to consume so much time in replying to the unkind and unprovoked remarks of the chairman of the Judiciary Committee. Surely, sir, that gentleman cannot entertain towards me unkind feelings. Those remarks must have proceeded altogether from his attachment to the Senator. I regret, sir, that the gentleman felt it necessary, in order to evince his attachment to the proud Senator, to throw his gauntlet at my feet; to break his chivalric lance over the head of an humble petitioner at the bar of this House; and one, too, who never did him wrong, or said aught against him. The less, sir, the friends of the honorable Senator can say about this transaction, the better it will be for him; and I advise the chairman of the Judiciary Committee, before he thrusts himself into a cause like this again, to read the fable of the bear and the hermit.

The depositions which I took at Knoxville, Mr. Chairman, were mostly intended to show the tone and temper of the times, and they are mainly important in that point of view. Sir, when men become so lost in all sense of religious,

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ued.

moral, and political obligation, as to commence the purchase of votes, nay, sir, as to lead an ignorant boy to the polls, and, for the sake of one vote, make that boy *perjure himself*; and be guilty *themselves of subornation of perjury*, I ask, sir, at what would they scruple? Would the ballot box be safe in the hands of such men? I think not. This was done at the polls, where this pure and honorable Senator was engaged in pulling and dragging to the ballot box free negroes and drunken white men. (*They are the only people that can be dragged in Tennessee, sir.*) What do you think of the times, Mr. Chairman, when a Senator of the United States, who constitutes a part of the Executive of this great nation, not only from the opening of the canvass until the termination of the election, writes scurrilous productions in a scurrilous newspaper, but, sir, attends in person at the polls, in the month of August, (in the dog days, too, I believe, sir,) and tugs and sweats for two days, in pulling and dragging to the polls free negroes and drunken white men? These things were all done at Knoxville. (See Doc. No. 16.) The committee take it upon themselves, in the plenitude of their judicial powers, to discredit one of my witnesses; and wherefore? Because his story is improbable? No, for Mr. Lea admits in his communication to the committee, that there was some whiskey given. Now, sir, if Isaac *Lonas*, (not Isaac *Jones*, as the public printer has put it; for *Isaac Jones* is the last man in Christendom that could be tampered with,) I say, sir, if Isaac *Lonas* was the friend of Mr. Lea, where the necessity of giving him any thing to vote for Mr. Lea? Is William Morefield's story inconsistent? No. Mr. Lea gives him credit by offering to take his deposition himself. As Mr. Lea has made a statement about this matter, I will make one also. On the day that Mr. Lea notified me that he would take the depositions of William Morefield and others, I attended, and he informed me that McCahan was the only witness that attended, and that he wanted to get them all together. Now, sir, if McCahan was willing to swear that he had not bribed *Lonas*, why did Mr. Lea not take his deposition? It was the very same sort of testimony that he had been taking before. The truth is, I suspect, sir, McCahan refused to swear about it. If Morefield was a man of bad character, why was he not impeached at home where he was known? No, sir, that could not be done, for not a man in the county of Knox would swear he would not believe William Morefield upon oath. His word in Knox county is as good as Senator White's. And I will say here, Mr. Chairman, once for all, that there is not one of my friends whose depositions have been taken in this case, but is equal in point of veracity, integrity, and honor, to any member of Congress on this floor from Tennessee. I say *equal*, sir, not superior, because that would be out of order. They are not only unimpeached, but, sir, they are un-



peachable. I was compelled, in many instances, to take the depositions of my worst enemies. Of these I will say nothing more than I have heretofore said.

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I will now, Mr. Chairman, take a brief view of the remaining precincts, and hasten to a close.

Speech of Mr.  
Arnold, continued.

The next precinct which comes in order, is Unitia. It is proved by William Griffiths, Esq., Joseph McCulley, and Francis Shaw, (see Doc. No. 17, and Doc. letter O,) that one of the inspectors swore himself; that the special deputy sheriff, who held the election, and who kept the key of the desk where the ballot box was locked, was not sworn at all; or, if sworn, neither the judges at Unitia, nor the high sheriff who deputed him, knew the fact: so I take it for granted he was not sworn; indeed, sir, it is not pretended that he was. It is proved that Francis Shaw, a blind man, kept the key of the outside door of the house where the box was deposited. It is proved that he had five other keys, besides the key which John J. Shaw, the deputy sheriff, had, that would unlock the desk where the box had been placed. It is proved that Francis Shaw, when he went to bed, left the key of the outside door in his breeches pocket. F. Shaw and his nephew, John J. Shaw, were both warmly Mr. Lea's friends. How easy, sir, was it for any individual, who felt disposed, to get the key of the outside door, and some one of these desk keys, and rifle the ballot box. It is proved that the inspectors were so much opposed to me that they were circulating tickets for Mr. Lea while they were holding the election. All this, sir, in the estimation of the committee, is perfect stuff. But the committee triumphantly seize upon one circumstance, and, by *suppressing* the whole of the testimony on my part, they pronounce sentence of condemnation against me, upon the testimony of a man by the name of Rogers, whose deposition was taken after I was some two or three days on my way to this place, and to take whose deposition Mr. Lea never gave me any notice. The committee harp upon this circumstance; they repeat it again and again in their report. Yes, sir, knowing that John J. Jones was not of age, say the committee; knowing that the inspectors had refused to let him vote at Marysville, for that reason I loaned him my horse to go and vote at Unitia. They studiously avoid any portion of the testimony that would, in the least degree, give to the transaction on my part an innocent appearance. They say it is the only illegal and unworthy transaction in the whole election. Now, Mr. Chairman, be so kind as to permit me to give my version of this affair: and I think you will perceive that so far from having acted wrong myself, I have been by others most unfairly and injuriously treated. From what the committee say on this subject, would any man believe that this same John J. Jones, two years anterior to the last election, actually voted for Mr. Lea at the very same place he now offered



1830,  
21st Congress,  
1st Session.

Speech of Mr.  
Arnold, continued.

to vote for me; and that the very same sheriff who took his vote then, is the very same man who holds the election at the same place where Jones is denied the liberty of voting now?

From what the committee have said on this subject, would it not be sooner believed that Jones was a dwarfish minor, than that he was a very tall man, weighing one hundred and sixty or seventy? Yet, sir, instead of what the committee would have to be the facts, what I have stated are the facts, as proved by one of my worst enemies, and were before the committee at the time they made this triumphant report. (See Doc. No. 18.) Rogers's deposition, upon which the committee build their report, is not testimony, because Mr. Lea gave me no notice that he intended to take his deposition, and because I was not present by myself or agent to cross-examine. But suppose it to have been regularly taken, it carries condemnation upon its own front. The witness swears, that when Jones came to me to borrow my horse to go to Unitia to vote, because he was denied that privilege at Marysville, I asked him how much he lacked of being old enough, and he told me he lacked five months. Now, sir, in the name of common sense, if I intended to smuggle Jones's vote in, right or wrong, what motive could I have had in asking how old he was? I could have had none, sir. If this had been my intention, his age was the very last thing about which I would have inquired: I would have desired to remain ignorant on that subject. Now, sir, I must be permitted to state what were the facts about loaning this horse. It is true, as stated, that Jones came to me, (as did many of my other friends,) and told me that, two years before that, he had voted for Mr. Lea; that the very same sheriff who *now* refused to receive his vote, received it then. I asked him what was the objection. He said they alleged that he was not old enough. Well, said I, are you not old enough? He replied that *he believed he was*, but as he was not certain of his age *to a day*, he felt scruples about *swearing* to it. The sheriff and others of Mr. Lea's friends, who opposed his voting, he said, alleged he lacked *two months*, but these same men had received his vote two years before for Mr. Lea. He said he had no doubt now, if he were for Mr. Lea, his vote would be received. I knew that every judge and every sheriff in the county were against me. My friends were complaining that there was not fair play. These were times, Mr. Chairman, if a man expected to get any votes, it stood him in hand not to be over nice and fastidious. With this view of the case, sir, I lent Jones my horse to go to Unitia to vote, with an express understanding that he would not swear to his age; and, to be candid, on this occasion, sir, I believe that our agreement was to practise deception upon the judges at Unitia, not as to his age, but as to his political. Jones was to pretend that he was for

Mr. Lea, and I expect he did, sir. Rogers is surely mistaken, innocently I hope. I feel, my Chairman, that, in this transaction, I neither violated the laws of the land, nor the rules of honor.

1880.  
21st Congress,  
1st Session.

Speech of Mr.  
Arnold, continued.

At McFarland's precinct all the judges, all the clerks, and the sheriff, were Mr. Lea's devoted partisans. The sheriff and judges were his family connexions; and the judge who kept the ballot box the first night of the election, was Mr. Lea's dearly beloved cousin. But the most ridiculous and suspicious part of this transaction is, that, although the judges lived close at hand, and although the neighborhood is thickly settled with highly respectable people, they could find no place to keep the ballot box but at the house of the sheriff, who the judges believed would make an attempt upon the ballot box that night. They would not trust Mr. Lea's cousin with the key where the box was locked, but they would make him stay there to prevent his uncle, the sheriff, from using another key, (which they evidently suppose he had,) and with which he might obtain access to the box. And although left there to prevent his uncle from coming with another key in the night, as they evidently supposed he would do, to rifle the box, yet they cannot tell whether this chosen, disinterested cousin sentinel watched the box or not, or whether he even slept in the room or not. This affair, sir, could be placed in a still more ridiculous light, but I will pass on to McGinnies's precinct. At this precinct it is not pretended that the inspectors were sworn at all. But the committee say I received the majority, and that two of the inspectors were my friends. Very well. Whose duty was it to swear the inspectors? It was the duty of the sheriff who held the election. Who was he? Claiborn Lathan, a devoted friend of Mr. Lea, who had a bet upon the election. Why did he not swear the inspectors? Why, sir, because he knew that at that precinct I was to get a triumphant vote, and if I had not been defrauded at other places sufficiently to defeat me, they had intended to set aside this vote. And, sir, if I had been elected with this precinct, and defeated without it, you would have heard a clamor, sir, such as you have not heard lately. I notified Mr. Lea that, on the 2d day of November, I would take the deposition of William F. Williams. There is one of the first public houses in East Tennessee kept within half a mile of the place of taking this deposition. Mr. Lea had to pass this public house on his way to the place of taking Williams's deposition. He did pass both those places on the evening before the day appointed for taking Williams's deposition, and, instead of stopping at one of these places, he pushes on a mile and a quarter beyond the place for taking depositions, and staid all night with my witness, who is his political partisan, too, the night before I had appointed to take his deposition. Now, sir, I will not do William F.

1890.  
21st Congress,  
1st Session.

Speech of Mr.  
Arnold, con-  
tinued.

Williams the injustice, although he is my enemy, to believe that he was tampered with, but I verily believe Mr. Lea intended to tamper with him. Sir, if I had committed an act so grossly improper, I never should have heard the last of it. (As to the transactions relative to McGinniss's precinct, see Docs. Nos. 20 and 21.) As Field's precinct there can be no earthly doubt that the ticket of a revolutionary soldier who voted for me, was torn up by the deputy sheriff who held the election. (See Doc. No. 22.) Sir, the good old man talked to me about the tearing up of his ticket. I met him shortly after the election. He took me by the hand, and, in a tone of the deepest sorrow, said, "It was my ardent desire that you should have been elected. I tried to vote for you, but I am told my ticket was torn up without being put in the ballot box. I am now an old man. When I was young, I shed my blood in the cause of my country and of liberty; and it pains my heart to think that, now I am old, I am not allowed to exercise the dearest right of a freeman, I am not allowed to vote according to the earnest desire of my heart, approved by my best judgment." Here, sir, his voice faltered, and the big tear dropped upon his venerable and shrivelled cheek.

Mr. Chairman, I am well nigh through; and I feel thankful to the committee for the attention with which they have been pleased to listen to me. I am sorry, sir, that I have had to trouble this House so much; but I felt that justice required that the transaction attending this election should be here examined. This I have done, sir, to the best of my feeble abilities. I think, sir, that our request is a very moderate one. We only ask to have the laws of the land extended to us. Banks and bank influence may be wielded against us; United States' Senators may write in scurrilous prints against us; sheriffs and deputy sheriffs may ride through the country, shaking their executions and tax books in *terrorum* over us. We will meet and combat all this, sir, if we can only have the laws of the land for our guide, and for the restraint of our adversaries.

We ask, sir, not to be outlawed. To send this election back to the people, sir, with a declaration that it shall be conducted according to the laws of the land, will be to us in Tennessee like pouring oil on the troubled ocean. It will calm and quiet us. It will give us faith in the laws, and in the justice and wisdom of this body. To sustain this election, will be as effectually to repeal the law of Tennessee as an act of our Legislature could possibly do it. We shall feel, sir, that we are outlawed, to all intents and purposes; and where it may end, sir, I am not able to say. It may look like a mustard seed now, sir; but, like all evil and dangerous precedents, it will have a rapid growth; and it may yet expand its branches until it overshadows this land. I am neither a prophet, nor the son of a prophet; but mark,

Mr. Chairman, what I say, its leaves will not be for the healing of nations, no, sir; but, like the deadly opas of Java, it will blight and mildew every thing within its contaminating influence.

1830.

21st Congress,  
1st Session.

Mr. LEA said the petitioner had been indulged in his address to the committee, as far as even the extravagancy of his feelings might lead him to desire. Neither he nor any friend, either here or elsewhere, could ever say that he had not enjoyed the amplest opportunity to make out his case in his own way; and that, too, in a manner involving persons and things wholly unconnected with the question for decision. Of the propriety of this indulgence (since others had thought proper to grant it) Mr. Lea had no intention to complain, although he was the individual most immediately interested. He would not assume to himself the province of expressing either approbation, or the contrary. It might, however, be due to the occasion to remark, that in granting this indulgence the House seemed to have been unaware of the precise nature of the petitioner's application. It was not a claim to a seat in this House, but an attempt to render one vacant, and in such a case the petitioner could have no more right to be heard at the bar of this House than any other petitioner on any private claim—no more right than any one or all those who had voted for him at the election. That he was granted the privilege to be heard at the bar, under existing circumstances, was thought to be without precedent, and could be accounted for only on the supposition that the true character of the petitioner's demand had not been distinctly and generally understood by the House. Since, however, such latitude had been conceded, he (Mr. L.) should be the last man to express regret. He had rather found gratification that the petitioner had enjoyed an opportunity of displaying to the House, as much as possible, all that he was, and all that he desired.

Speech of Mr.  
Lea, the sitting  
member, in re-  
ply.

Mr. L. said that he had taken no part in the preliminary discussions; had permitted the petitioner to proceed, without interruption, in his extraordinary and disorderly address; and remained passive until the proper time had arrived for a reply, to vindicate, not merely his own rights, but the rights of his constituents, the characters of those assailed, and the honor of his country. If he could have believed that he was not entitled to a seat on that floor, by the constitution and the laws, no consideration would have induced him to remain there a moment. But while he was perfectly satisfied that the legal votes of a majority of the district had placed him there as their choice, nothing but the legitimate decision of the constituted tribunal, no array of opposition, no denunciation or misrepresentation, should prevail upon him to forsake the rights of the people, surrender his own just claims, or abandon the duties of his station.

Mr. L. confessed that he would have preferred being a spectator, rather than a participant in this vote-buying affair.

1838.  
31st Congress,  
1st Session.

Speech of Mr.  
Lea, continued.

piece—not that he had any fear of the result, or that the truth of the petitioner's statements would be established, or that the House would credit any of his wild and unfounded calumnies, but because, when they were not true, one of our own citizens had given public utterance to those slanders, which, it is believed, would tend to disgrace the people of his State in general, and of his district particularly. Mr. L. said that when he looked at the past; and then at what was going on here, he confessed his Tennessee pride was humbled—not because the people generally were less virtuous or patriotic than they had been heretofore, but because he was compelled to stand up in his place on that floor, and admit the humiliating fact, that there were in his State, and in his own district, some men whose occupation it was to disseminate calumnies, with the deliberate purpose of degrading the character of that country. With the spirit of him who sought the destruction of all because he could not rule supreme, they seek to prostrate all, where they feel themselves to be degraded and desperate. To gratify revenge, and to attain apparent exaltation, by sinking to the level of their own degradation such as have characters worth preserving, and have contributed to thwart their views of unhallowed ambition, they hesitate not to employ the vilest means. On what other principle could that be accounted for, which had passed before us for the last few days? For what other purpose was the indecent display intended? Mr. L. said it was a deep mortification to him to reflect on the foul slanders thus enacted against the people of his district. He could not refrain from adverting to this conduct, for the purpose of disclaiming it for all, except a few of the people of that country. Friends or foes, supporters or opponents, he felt assured that but few, indeed, would be found to countenance the petitioner in the scandalous manner in which he had endeavored to tarnish the honor of his State, at home and abroad.

Mr. L. said that what had been allowed, and had already transpired in this case, would oblige him to depart, in some degree, from the common rules of decorum in debate; but he certainly would avoid the style of discussion adopted by the petitioner. Respect for himself, for the House, for the nation, would prevent him from entering into any bickering, or from bandying words with such a man. It was repugnant to his feelings, and to the character which he hoped to maintain. He would endeavor to subdue those passions which some points of the case were calculated to excite. A victory over himself would be worth far more than any triumph over a degraded adversary. He was determined to be as brief as the case would allow; but he could not touch even the necessary points without consuming a considerable portion of the day.

Mr. L. said that, before entering on the strict merits of the contested election, he must particularly advert to one

1830.

21st Congress,  
1st Session.Speech of Mr.  
Lea, continued.

subject, which had been most wickedly introduced into the discussion. He did not know that he should have felt called on, or even at liberty, to trifle with himself so far as to take any notice of this matter for his own sake alone, and his own share in it; but others had been implicated, and he owed a duty to them. If he had neglected himself, he was to be the sufferer; but if he omitted to answer, as publicly as the charge was made, the foul slanders uttered on this floor, and reiterated, contrary to order, and without a shadow of proof, against others, whose names had been implicated with his, the people of Tennessee might think him shamefully derelict in his duty to them. A charge had been made openly on that floor against several individuals, that they had participated in "bribery and corruption." Although wholly irrelevant to the argument, disorderly and false, it had been repeated on that floor with aggravated language, and filed in printed documents among the papers of the House. Ought it to be passed by in silence? Some may think it ought not; and it shall, therefore, be attended to, although many may consider it unworthy of even a denial, inasmuch as the petitioner's own story carried falsehood and condemnation on the face of it. Mr. L. had no idea that there was one gentleman in that House, one man in the nation, who had heard the particulars, not even the petitioner himself, who believed, for an instant, a single word of this infamous charge of "bribery and corruption."

But how, he asked, was this charge brought forward before the Committee of Elections, and thence into this House? The documents, by which the charge was intended to be drawn forth, consisted of two electioneering pamphlets written by the petitioner, and one by the sitting member, which last mentioned pamphlet was an answer to the second presented pamphlet of the petitioner. These three pamphlets, as the Speaker informed the House the other day, had been folded and sealed up in an envelope, endorsed as documents, and handed to the Speaker, by whom they were thus presented to the House, and thus passed to the Committee of Elections, under the apparent sanction of the House, without either the Speaker or the House being at all apprised of their character, but relying on the honor of the petitioner. In this *clandestine* manner were they ushered in, when no notice whatever had been given to Mr. L. of the intention to adduce or use any such documents. The petitioner had thus offered these pamphlets, but had omitted to present another of the sitting member, which was an answer to the first of the petitioner here presented.

In the report of the Committee of Elections, mention is made of some excitement between the parties. These very pamphlets occasioned it, and it is proper to give a few words of explanation, lest it may be supposed greater than it was. On seeing them in the hands of members, Mr. L. inquired



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Speech of Mr.  
Lea, continued.

what they were, and was told; but some one, who had not seen them opened, observed, that he had supposed, as Mr. Lea's name was to one of them, that he had presented it. To which he answered, protesting that he should have felt himself disgraced if he had done so. The petitioner endeavored to explain, and adduced his charge. Mr. L. replied that he would not discuss the matter, but would not permit any man to make such a statement in his presence, any where, without repelling it as a deliberate calumny. This was the amount of the excitement.

Mr. L. said he would beg leave to offer to the consideration of the committee so much of this omitted pamphlet as contained his first recorded answer to the charge in question. He would then invite attention to his second answer in the pamphlet on file, which contained an extract from a newspaper, referred to in one part of the evidence, in the affidavit of the Hon. H. L. White, taken by the petitioner, who thereby obtained the oath of that gentleman, (whose word was as good,) confirming the newspaper statement, and thus falsifying that of the petitioner. [Mr. L. read that part of the affidavit.]

Mr. L. said that the petitioner's pamphlets were subject to the inspection of all, being among the papers of the House, and his speech, which was substantially the same thing, though in language even worse, had gone before the public. The printed answers would suit either the written or verbal accusation. He did not wish to make it a matter of declamation, but simply to present the facts correctly before the committee and the country, and therefore desired that his printed answers might be read by the Clerk, as it would relieve him from some labor, and he would, also, avoid the excitement of feeling which his own rehearsal of them might tend to create. He asked if it would be in order for the Clerk to read them.

The Chairman said it would not be in order.

Mr. CARSON said the Judiciary Committee had reported that this whole matter was irrelevant, and ought not to be printed; but he thought the report of that committee was conclusive only against the *printing*, and that this committee had a right to judge whether it might not be *read*. He said the petitioner had been permitted to make the charge in full, and it was but fair that the evidence in exculpation should be read.

The Chairman stated that the whole discussion on this subject had been out of order; but that its tendency had not been discovered on yesterday, until it had progressed so far that it was judged advisable to suffer it to continue to the end of the charge. The Chair, however, could not allow its continuance to-day, and hoped that the gentleman from Tennessee would conform to that decision.

Mr. LEA said it was his wish to conform to the decisions

of the Chair, and he would not question their propriety, except where he felt bound by duty to do so. He agreed with the Chair, that much irregularity had been allowed in the discussion; but he submitted, if it was fair to tolerate, that charges should be exhibited and filed here, without allowing an opportunity for explanation; and that, too, by the use of similar means. Although the printing of the pamphlets for the use of the House had been refused, yet the petitioner had been allowed to refer to them in the course of his argument, claiming a right to do so under a decision of the Speaker; whether properly or not, was immaterial, so far as concerned the right of reply. The pamphlets were there on file for the inspection of all, permissively referred to and commented on by the petitioner on this floor, repeated and enlarged, without restraint from the rules of this House, or of decency, until the calumny had been presented in almost every form. Brief and very appropriate answers had been given by different gentlemen, but they were unavoidably incomplete, and no one had yet stated all the facts as they occurred. Shall the charge be exhibited in every way, and the answer be stifled? Mr. L. did not wish to give a detailed *verbal* statement, which could not be as full and satisfactory as those which were heretofore written with deliberation, in direct answer to those very printed charges which have been used before this House, and are now on its files. He hoped that his answers would be heard as they were made, in the order of the transactions themselves.

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Speech of Mr.  
Lea, continued.

The Chairman said he would not take the responsibility on himself of allowing the documents to be read—he considered it out of order—but he would leave it to the committee to decide.

Mr. ARNOLD then rose, and was about to address the Chair; when

Mr. STURGEON inquired of the Chair whether the petitioner had any right then to be heard.

The Chairman said it was certainly out of order. It was not proper to have any collision between the petitioner and sitting member.

Mr. WICKLIFFE said that no one would suspect him of a disposition to withhold from the sitting member any privilege which belonged to him, or any accommodation which it was proper (consistently with his notions of his duty as a member) to accord to that gentleman. Yet he felt himself constrained to oppose the motion to have any portion of the documents read by the Clerk of this House.

The Committee of Elections have reported that the whole of these documents were inapplicable and irrelevant to the question before the committee. A motion was made to print these documents. The House had devolved upon the Committee on the Judiciary the duty of directing the printing of such parts of these documents as they might be of opinion were relevant.

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Remarks of Mr.  
Wickliffe rela-  
tive to the read-  
ing of sundry  
printed docu-  
ments.

The part now desired to be read was presented to that committee (of which he was a member.) That committee were unanimously of the opinion that no part of it was applicable to the question before the House as evidence. It is equally so as argument. Mr. WICKLIFFE asked, with what propriety could the House order that which was totally inapplicable to the subject before it to be read, and not read every other part, which was claimed by the petitioner in the first instance as legitimate evidence for him? Sir, the whole budget is inapplicable, and unfit to be deposited among the files of this House. It cannot be desired, after what had already been said in this House, to read these documents, further to vindicate the character of the worthy Senator, or the sitting member, from the unworthy and groundless imputation made on this floor. He would take the liberty to say that it was not only the united opinion of the members of the Judiciary Committee, that these papers were wholly impertinent, but furnished the most triumphant refutation to the whole charge as made here or elsewhere.

Mr. TUCKER said he had not read these documents, but was informed of the nature of them, and that they had no connexion with the subject before the committee. Believing so, he thought, when this case was last under consideration, that these documents ought not to be read. The petitioner was indulged in making his remarks to the committee. It was wrong to allow him such a latitude of indulgence. But, if it was wrong in the first instance, it is no reason why we should continue to do wrong. He was opposed to the reading of the documents.

The question being put, leave was granted, and the appropriate parts of the pamphlets were read by the Clerk.

Extracts from  
said documents

From the first pamphlet: "The *veritable and immaculate Thomas D. Arnold* has at last come out and charged *Hugh L. White* with '*bribery and corruption*,' to procure his last election as Senator in Congress, and that I was an instrument in the affair! If Judge White be not guilty, the pretended instrument must, of course, be innocent. And am I to suppose it necessary to discuss the question of *his* guilt, under *such* an accusation, before the people of this district, of this State, or of the Union? What is to be thought of the state of things in this country, when such a man as *White* is to be thus abused *without cause or apology*? Having lived to old age, through numerous and trying scenes of private and of public business, with unblemished reputation for most scrupulous integrity, who can be so '*ineffably stupid*' as to believe him capable of such high criminality, and that, too, without any plausible motive? He has been twice elected Senator by *unanimous* votes of the Legislature of Tennessee; and can it be supposed that it was necessary for him to buy the vote of any one man? and especially of one who was then and had been notoriously among the warmest and most zealous advocates for his re-election, a thousand times pledged to his constituents to pro-

mote it with all his energies? But why am I betrayed into any kind of argument to disprove that which no man of sense and honesty can possibly believe?

1839.  
That Concerned,  
1st Senator.

Extract from a  
printed pam-  
phlet.

“When Mr. Arnold, in his speech at this place, made this charge of *corruption and bribery*, I told him, to his teeth, three times distinctly, that it was *utterly and positively false*, and that the transaction was one of the most innocent character. For the correctness of that statement I now pledge my reputation. When he called on me to answer his catechism concerning this private transaction, unconnected with the public, and whether the money Mr. Green had of me was advanced by Judge White, I told him that, on such subjects, I would be catechised when and by whom I pleased, without recognising his right to do so; but, if he thought Judge White had advanced the money, that he might inquire of the Judge himself concerning it, or go and ask his *master* whom to catechise next. Was I bound, at the bidding of this *busy-body* in other men's matters, either to enter into a detailed explanation, or to give him a ‘few scraps’ without explanation, when all that the public could desire to know would be whether the transaction was fair or foul, and when that matter had been fairly explained by Mr. Green and myself in previous written addresses to the public, to which I now refer? Certainly I was under no such obligation, especially when I directed the accuser to the *principal* object of his accusation for further satisfaction. If he really desired information, why did he not ask it as a gentleman, previously to his proclamation in a speech? Or why, before trotting to a printing office to blazen the calumny to the world, did he not inquire as directed, to give the pretended principal offender a chance to vindicate himself? The occasion for slander was considered too precious to be spoiled in that way. Was he afraid of hearing too much of this transaction, and by evidence sufficient to cover with confusion himself and his associates in this deliberate calumny? Or was he afraid of hearing a little about his own application for money to the same individual, on whom he was showering volleys of abuse, so as to look ‘for all the world’ like an actual offer to be ‘*bought up and silenced*?’ I tell him again to go there for information, which will amply satisfy the most curious on this subject, but *sorely gall* those who have brought this harmless, private transaction before the public. It is mere pretence, that there is any mysterious secrecy in this business; the facts have been long known to many, and, I have no doubt, to the present accuser himself. The story is ridiculous, absurd! Has it come to this, that a gentleman cannot lend a little money to his own particular friend to relieve him from distress and grinding oppression, without being charged with corruption, and that, too, by an enemy who asked for some himself, and is angry because he could not get it? If the real lender chose not to be known by the borrower, (which was the case in

1830:  
21st Covenant,  
1st Session.

Extract continued.

this transaction, as every man engaged in it has stated, and would swear,) it is the strangest mode of corruptly acquiring favor that ever I knew. The truth is, that the man who advanced that money did it under circumstances entitling him to the increased esteem of every honorable man in society. And, as the public can never be induced to believe that *four of us were fools and knaves enough to engage in such bribery and corruption for nothing*, they will ever regard *Mr. Arnold as a base and wanton slanderer*, having no respect for the feelings or rights of his neighbors. I am not afraid to leave this matter here; and I have moral courage enough not to be driven from my position to gratify such a scoundrel; but any honorable man can, at any time, have all the information that such a one ought to desire."

From the second pamphlet: "With this suitable preparation, we come to p. 5, in which we find renewed the charge of 'bribery and corruption,' on account of the loan, through me, of \$1,077 to Mr. Green, of Roane county, in September, 1827, and, in pressing this charge, the refined *Jo-sey* co-operates in the *deliberate slander of his uncle*, Judge White, knowing the accusation to be utterly false! What have we come to in this devoted section of country? The writer seems to think that he has managed this charge with wonderful dexterity, relying much on what he calls my former silence, as a proof of guilt. This same subject had been brought before the public months ago, and Mr. Green, to whom the money was loaned, came out in an address, under his own signature, and gave to his accuser, at that time, an answer so entirely satisfactory, as to effectually silence him on that subject. That answer was never replied to; and with it, before him, my opponent has lately renewed the charge in the coarsest language. *When such a charge was thus made, improbable in itself, unsupported by even the shadow of proof, having been positively and publicly denied by Mr. Green, under his signature, and that denial acquiesced in by the first accuser*, I did not feel that Mr. Arnold was entitled to any other answers than those which I have heretofore given. I still feel so; and I did not then believe, nor do I now think, the community generally desire any further answer to such a groundless calumny. I should have persevered in my course, and staked myself on the absurdity of the accusation, as well as the integrity of those accused, bidding defiance to such as might be disposed to propagate a belief of our pretended criminality, if the last Knoxville Register, dated the 29th instant, had not given a more enlarged account of this matter. I have no idea of being driven from a proper position by the abuse of any such gang; but as the newspaper account has been made entirely without my participation, I am more than satisfied that it is done, nor is it necessary for me to alter it in any particular; on the contrary, I here pledge myself that the account there given is *true*, so far as I have any know-



ledge or information, of which I have enough to satisfy me, from the corroborating statements of all the four individuals concerned, that every part of it is strictly correct. *Some additional circumstances have been omitted, for the sake of other persons, I suppose, who are not now before the public; but, if disclosed, they would illustrate still further the purity of the transaction, and afford some additional evidence of Judge White's well-earned reputation. Enough, however, is given for every valuable purpose, at present; and so far am I from desiring concealment or apprehending injury on account of this affair, that I here incorporate, in this answer, the newspaper statement, that it may have as much publicity and circulation as possible, and thereby more thoroughly stamp disgrace on the accuser. Here is the newspaper statement—in language clear and forcible—giving as many details, I presume, as even Mr. Arnold could desire.*

1830.  
2d. Congress,  
1st Session.

Extracts from  
an electioneering  
pamphlet.

“The substance of Mr. Arnold's charge is, that, in 1827, Judge White was a candidate for re-election to the Senate of the United States; that James I. Green, Esq., a Senator in the State Legislature, had been corruptly bribed by the Judge to vote for him, and to violate the constitution by electing a Senator for eight years instead of six, and that, with a view to conceal this bribe, Mr. Lea was used as an instrument, who made the advance in the shape of a loan, and took a mortgage upon a tract of land which Green held as an Indian reservation, and thereby became interested in supporting such titles, to the prejudice of the State.

“This, we think, is the charge plainly stated; and to an accusation so serious, it would seem to be all-sufficient for the Judge to plead not guilty, and call upon his accusers for proof, and, if they failed to produce it, to expect the public to scout such men from their presence as unworthy of confidence; but, however safe such a course might be, we intend not to occupy this ground, but to give a detail of the transaction.”

“We are authorized to say, that on the Monday and Tuesday preceding the session of our Assembly, in 1827, Judge White was at Kingston attending to some business in the circuit court, and intended to go from that place to Nashville. While he was at Kingston, Col. James C. Mitchell came to him, and asked him if he had any money for which he had no immediate use, saying a friend of his, Mr. Green, was in much need of some, and knew not where to procure it; that a judgment had been obtained against him for about a thousand dollars, and an execution had issued; that he had made an engagement by which he had expected to receive the money on the first day of court; had prevailed on the sheriff not to advertise, by pledging his honor to pay the money, or to deliver up property which should be sufficient to raise the money by an immediate sale; that he had been disappointed; that the plaintiff's counsel would receive



1830.  
21st Congress,  
1st Session.

Extracts continued.

nothing but specie, and was threatening to take judgment against the sheriff. In this dilemma Mr. Green had gone to some friends, from whom he had expected to borrow the money, or by whose agency he might procure further indulgence on the execution, but they had declined giving him any pecuniary assistance, and thus he had lost the hope of obtaining either money or indulgence from that quarter, and had come and made his case known to him, (Mr. Mitchell,) and had solicited his friendship, by some means, to procure for him the money; that he (Mr. Mitchell) had it not to lend, had spoken to Mr. Lea and others, and endeavored to borrow it; that they had it not to lend, and, as a last resource, Mr. Mitchell determined to apply to Judge White; at the same time, Mr. Mitchell stated that Mr. Green was willing to secure a repayment of the money by a mortgage of his plantation, to the title of which there was no dispute, and which was worth at least three times the sum wanted. To this application, Judge White replied that he had the money, but was unwilling to loan it; that Mr. Green was a member of Assembly, and it was probable the election of a successor to the present incumbent in the United States Senate might be matter of consideration before the Legislature; that as he was the then Senator, they might choose again to use his name, and that, while there was a possibility of such a thing, he would not embarrass any member by a pecuniary obligation. Mr. Mitchell urged that this ought to make no difference, as Mr. Green was very warmly on the Judge's side in politics, and had repeatedly pledged himself to his constituents to endeavor to bring on the senatorial election, and to vote for the then incumbent. Judge White still declined, and said, although he knew that was true, yet the transaction might be misrepresented, and that, at all events, it would be indelicate to Mr. Green, who could not feel as free to examine the pretensions of a man who had conferred on him a pecuniary favor as if he was under no such obligation. Col. Mitchell then observed that his whole object could be attained if the Judge would lend the money to Mr. Lea, and let Mr. Lea loan it to Mr. Green; and that he would pledge himself that Mr. Green should not know that Judge White had any agency in the transaction until the rise of the Legislature. To this the Judge consented, and let Mr. Lea have the money, who loaned it to Mr. Green, and took a note and mortgage in Mr. Lea's own name. Positive assurances of Mr. Mitchell and Mr. Lea have also been given that Mr. Green did not know that the Judge had any agency in the loan, as they believe; neither did Mr. Green and Judge White ever exchange words upon this subject until last summer, months after the Assembly had risen. It is true the Judge travelled from Kingston to Nashville in company with Mr. Green, Mr. Garret, Mr. Hope, Mr. Carson, and the editor of this paper. But it is equally true that he never

conversed with Mr. Green on the subject of the loan, the judgment against him, or any thing connected with either of these subjects, nor did he ever speak with him on the subject of the senatorial election, until after it was over; he never asked any member even to nominate him as a candidate for re-election, and would have preferred that the name of any man in East Tennessee of his *own* politics should have been used instead of his own; but would have been a candidate in opposition to any man of a *different* political creed.

1830.  
21st CONGRESS,  
1st Session.

Extracts con-  
tinued:

“It is not true that there is, or can be, any dispute between the State and Mr. Green, relative to the title of the land. There is a law authorizing any person claiming an Indian reservation, to pay one dollar and a quarter per acre, and obtain a grant in fee simple. Mr. Green had availed himself of the provisions of this law, and obtained a grant from the State, thus cutting up all ground of dispute.

“The statement that Mr. White was elected for eight years instead of six, is so plainly untrue, that it seems strange even Mr. Arnold should make it.

“The only objection we have ever heard stated, was, that it was unconstitutional to go into the election of a Senator *before* his first term had expired; and this would not happen, in the present instance, until the 4th of March, 1829. But to this a satisfactory answer has been repeatedly given, that the Legislature might go into the election as well before as after the expiration of the term; that every legislative body in the Union had, at some time or other, elected in advance, and unless they elected at that time, we would be without a Senator at the called session of the Senate after the 4th of March, 1829, or the Governor must, at an expense of perhaps twenty thousand dollars, convene the Legislature for the sole purpose of electing a Senator.

“If this loan to Mr. Green was immoral, we verily believe it would be exceedingly difficult for Judge White to make a virtuous use of his money. We not only think he might well have made the loan, but we believe it would have been immoral in him not to have done so. He neither purchased nor attempted to purchase Mr. Green's vote with money. They were already on the same side in politics. Mr. Green had been, and was, a warm friend and admirer of Judge White, and, while canvassing for his seat in the Legislature, had frequently pledged himself to the people of his district to vote for Judge White for Senator. But, it is triumphantly asked, if there was nothing wrong, why he did not lend the money in his own name. The answer has already been given. It would have been doing the very thing which he wished to avoid—conferring a favor which might seem to influence a man who might have to vote for or against him.

“It is said it is the fashion of the times always to let a

1830.  
21st CONGRESS,  
1st Session.

Extracts con-  
tinued.

man know when you do him a favor. To this it may be replied, that the Judge does not pretend, in this respect, to be a fashionable man. He was educated by those who might now be called old fashioned people, who taught him, if ever he put five dollars into the charity box, not to hold it up to the gaze of the whole congregation, or it would cease to be valuable. Again; Mr. Arnold says, Judge White is not in the habit of doing good deeds; no man's cow has been saved by his money. His good deeds have been done in secret; he has acted in agreement with the scripture precept, of not letting his right hand know what his left hand did. Instead of conforming to the profligate code of morality which his slanderers would dictate, he would neither deprive himself of their benefit by publishing the names of those he has accommodated, nor by employing trumpeters to proclaim to the world his virtuous and benevolent actions, although it is well known he has always been a liberal and charitable man. But if Mr. Arnold wishes to keep a registry of the Judge's good as well as evil doings, we would respectfully refer him to some of those who were once his friends, but are now his revilers, as they are frequently in his company, and aiding to furnish facts prejudicial to his reputation. Perhaps they can throw some light on this subject.

"This foul and unfounded imputation would not have been made by any man without evidence, unless he felt that he had himself been operated on by money, or that he was willing so to be operated upon.

"We had just finished the above, when Mr. Arnold's 'Circular No. 3' was ushered into the world. In that production we find a repetition of the same charge of bribing Mr. Green, without the shadow of proof to give it plausibility. Mr. Arnold and his associates appear to think that, by ringing and repeating this charge, they will obtain belief from some quarter. Its repetition entitles him to the credit of unblushing impudence, and a real desire to glut his insatiable appetite upon the most spotless reputations he can find in society.

"He attempts to give color to this vile calumny, by pretended quotations from Mr. Green's address, which has been seen but by few in this district, and from the publication of Mr. Lea. He makes Mr. Green say he obtained the loan from a man who does not live within fifty miles of Knoxville. These are Mr. Arnold's words: 'Why has Green hazarded, in his circular, the falsehood that the man who advanced the money, *did not then, nor does he now, live within fifty miles of Knoxville.*' He then argues that, as Judge White lives near Knoxville, this is untrue, and intended to screen the Judge. The error in this reasoning consists in stating that as a fact, which Mr. Arnold could not help seeing was untrue. Mr. Green makes no such statement. He says, 'he had the good fortune to save his

property from the hammer, by succeeding, through the kind services of a friend, in obtaining the amount of money wanted from Mr. Pryor Lea,' and then adds, in the succeeding sentence, 'that the friend whose kind services and agency is above gratefully alluded to, was by no means the *'arch-wire puller,'* nor, indeed, was it his supposed *'punch of the mock drama,'* and what is most fatal, this friend did not *then*, nor does he *now*, reside within fifty miles of *Knoxville.*' The friend here alluded to, through whose agency he procured the loan from Judge White, was the Hon. James C. Mitchell, who resides at Athens, fifty or sixty miles from this place. The paragraph quoted from Mr. Lea's circular, evidently means the same thing.

1830.  
21st CONGRESS,  
1st Session.

Extracts con-  
tinued.

"In another place in the circular, Mr. Green uses this emphatic and conclusive language: 'I solemnly aver, before my country, that I had not, at the time I borrowed the money, nor at any subsequent time, either directly or indirectly, the smallest intimation that Judge White had any knowledge whatever of the transaction between Mr. Lea and myself. Nor, indeed, did I know or believe, that *he* had the slightest information concerning the matter, until at least eight months after the rise of the last Legislature.' Now, reader, compare these statements with Mr. Arnold's, and candidly and honestly say what you think of him."

Mr. L. continued, and said he was sorry that the reading of the pamphlets had been disapproved of by any gentleman of the committee; but he knew not how he could otherwise as satisfactorily have presented the whole of the facts. To the answers just read, it would be superfluous to add any thing in refutation of the charge; and it is difficult to conceive how any man, with the facts before him, could have effrontery, and folly, and wickedness enough to reiterate the accusation.

Speech of Mr.  
Lea, continued.

Mr. L. said he had been gratified at what had fallen from his honorable colleagues on yesterday. Their sensibility was just, and the facts stated by them incontrovertible and conclusive. His colleague from the third district had done nothing more than justice to his own constituent, and both had discharged but a delicate duty in the eulogiums which they had passed on the good and venerable man whose disinterested benevolence had been so vilely misrepresented and slandered on that floor.

Mr. L. said it certainly afforded him no pleasure to be abused as he had been, and, if that concession could afford any pleasure to his revilers, they were welcome to enjoy it; but he did not fear that this transaction would ever be, by any honest man, imputed to him as a fault, or an impeachment of character. On the contrary, if he had sought to have his character favorably proclaimed, he might have even courted the abuse which he had received; and it was gratifying to him that, in the district where he was born, and had

1830.  
51st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

lived to his present age, his assailants had resorted to allegations so clearly false and foolish, notwithstanding their arduous scrutiny had been prompted by the blackest malignity and most reckless ambition. He was conscious of numerous imperfections, yet no criminality had been alleged but what was so plainly unfounded, that no man of common sense could give it credence or circulation without virtually conceding his own deep depravity.

Mr. L. would advert to this matter in another aspect. The petitioner had endeavored to fortify himself by invoking the aid of all those who voted for him at the last election; and he has proclaimed, more than once, that five thousand freemen united with him in his accusation. He not only assumes that all those who voted for him participate in his calumny, but their number is augmented by about five hundred more than the truth, in order to give strength to the assumption. This is slander of his own supporters, with the exception of a few, who fully participate in the baseness of his efforts. Against them generally, it is an unkind cut, indeed, a most ungrateful return to those who voted for him, to hold them up here in so despicable and disgraceful a light. They do not deserve it; they are not forgers of falsehoods, and slanderers of their neighbors, as the petitioner would represent them. The grounds of their votes were different from any such detestable consideration. Mr. L. said it was not for him to know all the motives which may have influenced the voters, nor would it be possible to explain them, especially to strangers. Amidst their complicated variety might be found local and more extensive considerations, the influences of personal and political predilections and antipathies, together with the aspirings of some whose particular friends might seek to remove a supposed impediment in the road to preferment. Perhaps a more singular combination of circumstances never attended any election whatever, insomuch that while the individual elected claims no particular credit for success, he ought not, perhaps, to feel much disparagement from the smallness of his majority over his nominal competitor, however worthless he may appear.

The petitioner had also dragged into this debate the name of Col. John Williams. It was not material to inquire what authority he had for so doing. Mr. L. said that, whatever he might think of that individual, he did not intend to discuss his conduct or character here in his absence, even with an authorized proxy. He had done it freely with the principal himself; and, if any are so sore of their conflicts as to seek mean satisfaction through the instrumentality of hireling slander, or if any have a hope, by such means, to exhaust the patience of some, so as to make them quit public service in disgust, and thus make room for others, their agent may inform them that the objects are understood, and the speculation uncertain.



Mr. L. said his own conduct was not attempted to be impeached, even by the petitioner, in any of the affidavits, except in one small particular, which he was desirous to dispose of, and thus remove himself, personally, out of the remaining discussion. It was so pitiful an affair, that he must ask pardon for mentioning it, and he only did so, because some may not advert to the evidence itself to correct the petitioner's remarks, in which the broad charge was made, that one of the inspectors of the election at Tazewell had been tampered with by the sheriff as the agent of Mr. Lea, and improperly influenced by money. What are the facts in proof? Mr. Lea sent a request to the sheriff to transmit to Knoxville the result, as soon as known, of the election in that county, and that he would pay the messenger. While the sheriff was inquiring for some young man to go, Esquire Mason proposed to the sheriff that he would go himself, and the offer was accepted. The service was performed, partly in the night, the whole distance about ninety miles, going and returning; the charge six dollars, and paid by Mr. Lea. Although the anxiety of friends rendered such messages usual and proper from different counties, and although this messenger was proved to be of unimpeachable character, and a uniform supporter of the petitioner himself, and was in fact a substantial farmer of that county, whose personal curiosity may have prompted him to the undertaking, yet he is gravely charged with having been designedly and improperly influenced by such a paltry sum for such an arduous service! But the petitioner says that very little money will have a powerful influence on some men, and that it were foolish to give much when a little would do. Experience is better than theory, and, perhaps, no man has a better right to know than the petitioner himself.

1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

Mr. L. said that, before investigating particularly the law and the evidence on which the decision of this case will depend, it might be proper to notice briefly the lecture which the petitioner had given us on the purity of elections, and the importance of preserving the elective franchise unimpaired. Mr. L. hoped to be pardoned for remarking that this brought to his mind the old adage of "Satan's chiding sin." Who is this lecturer on the purity of elections? Let us look for a moment to his own conduct for a practical illustration of his real views on that subject. Besides other corroborating proof, we have, in the document on our tables, the affidavit (taken on notice to the petitioner\*) of John Rogers, who voted for him at the last election. To questions propounded, he gives these answers:

"I saw John Jones on his way to Unitia, on the second day of the last election, and he was riding Thomas D. Arnold's horse; and he said he was going to Unitia to vote.

\* This notice, marked D, page 50 of the printed documents, which is similar to those given by the petitioner, was denied by him in his speech, although presented by him to the House.



1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

"I applied to Arnold for his horse for Jones to ride to Unitia, and Arnold consented; and also Jones asked the same question, and Arnold told him he could have him.

"I think it was mentioned by us both to Thomas D. Arnold, that he, Jones, could not get to vote at Marysville; and Arnold then asked how much he lacked of being old enough, and Jones stated he lacked about five months."\*

But this matter is, also, presented by the proof in another aspect. The petitioner has not only given us this example of purity in elections, but, before the fact was proved so positively, he virtually denied it in his examination of his witness, Col. Wallace. That witness had proved that Jones offered to vote on the first day of the election at Marysville; but, when challenged, admitted he was not old enough by two months; that the petitioner attended the election at Marysville during both days, and that Jones was understood to have rode the petitioner's horse to Unitia, and there voted on the second day. After this, in the affidavit, we find propounded by the petitioner these three several questions:

"Do you know that I was present at the time Jones was challenged at the polls in this place?"

"Do you not know that, although present at this place on both days of the election, I was rarely in or about the courthouse?"

"Do you know whether I was present or not at the time you and Jones had your interview on the pavement near Freeman's tavern?"

Now what was the object and substance of these inquiries but a virtual denial of his knowledge on the subject? And yet that knowledge has been positively proved on him, so as to cause him to admit it on this floor, while endeavoring to make an awkward apology, by giving testimony himself, not only unsupported, but contradicted by the proof. Thus have we found this lecturer on purity in elections, in one small transaction, involved in three several difficulties; first, actually participating in knowingly procuring for himself an illegal vote; secondly, endeavoring to palm on the world a false opinion of his conduct; and thirdly, when caught at that, making an apology, which is contradicted by the proof. From this example, we may have some idea of the heartfelt sincerity of our lecturer, and of the reliance to be placed on his assertions and conduct in other particulars.

Mr. L. said that on recurring to the evidence it would appear that this matter was first brought out on cross-examination of one of the petitioner's witnesses, and that no other attempt had been made to impeach the conduct of any of his supporters. How far such an attempt might have been successful, it is unnecessary now to conjecture. Mr. L. said he had

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\* Two instead of five months in the original affidavit.

neither time nor disposition to prosecute such an investigation. He did not aspire to any eminence in exposing the indiscretions of his countrymen. He left that work for the petitioner. What time and opportunities he had, were devoted to the defence and the service of those whom he had the honor to represent on that floor. By the document on our tables, it would appear that but little time was afforded for taking evidence, after the first notice of the contest was given. That notice was in general terms, and the petitioner would not specify particulars, so as to give a fair opportunity to prepare counteracting evidence, although expressly called on to do so. The points of difficulty could not be known until the petitioner had taken his proof; soon after which he set off for this city, during his opponent's necessary absence from home, and about twenty-six days before he presented his petition. Before the Committee of Elections he refused to state or argue his case in writing, although offered his own time for that purpose. Thus has it happened that the evidence on some points is less perfect than it would have been, and the grounds of complaint have never been particularly disclosed until the delivery of the petitioner's speech. Mr. L. said the motives for such a course of unfairness must be apparent to all; and although the preparations for defence, both in evidence and in argument, must, of course, be less satisfactory than they otherwise would have been, yet delay had never been his object, and he felt sufficiently prepared to attain that decision which justice demanded. He did not intend to follow the petitioner throughout, or to notice much of his disgusting declamation. He would rely more on the investigations which gentlemen would make for themselves, than on any argument of his own, especially as he had been obliged to dwell so long on matters irrelevant to the main question. It would be enough for the occasion, very briefly to make some remarks on the election law, on the principles and practice governing this House in such cases, and on the prominent facts established in the proof.

Mr. L. would say a few words on the construction of the statute of Tennessee regulating the manner of holding elections. The argument of the petitioner manifested a misconception of the reasons of the law. First, as to the "one box" which the sheriff shall have to receive tickets, it is necessary only to observe, that one and the same box is to be used to receive tickets for all the different offices, to fill which the election shall be then held. In some States different boxes are provided for the different offices to be voted for; and every voter, for example, uses one ticket and box for Governor, another ticket and box for member to Congress, and so on; but the direction of our law simply intends that in the State of Tennessee all votes given at the same time and place for different offices should be put into the same box; one ticket

1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

1880.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

for each voter, containing all the names of his choice. It was never intended, if that box should be filled, or otherwise rendered unfit for use before the election was finished, that thereby the remainder of the voters should be deprived of their privileges, or the whole election be vacated; nor that such should be the result, if any other good reason should render it proper to have an additional box, as was the case at Tazewell, according to the true meaning of the law.

Considerable stress had been laid on the conduct of the inspectors and sheriff at that place of election, respecting the manner of disposing of the box. The facts will be noticed hereafter. The law says it shall be the duty of the "inspectors to take charge of the box;" but it does not say how they shall do this, and the manner is left to their discretion. Cannot a man have "charge" of a thing without holding or watching it continually? May he not resort to other persons or means to secure it, being responsible for it himself? The Clerk of this House and similar officers have "charge" of the papers of their offices, than which none, perhaps, are more important; and in those cases we know, by the experience of the world, what is meant by the terms in question. The inspectors were to keep the box safely, as in their discretion might be best. They did "take charge" of it, in directing how it should be disposed of, which was done accordingly, and with perfect security.

At one precinct it appears there was no seal put upon the box, according to the direction of the statute. This was the only departure, which had been shown, from the true meaning of the law, except in one other instance, where the inspectors and clerks were not sworn. The effects of these omissions will hereafter be considered.

Mr. L. said he would now advert to the principles on which this House had uniformly acted in deciding cases of contested elections. Its power to decide in such cases depends on the constitution of the United States, which says that "each House shall be the judge of the elections, returns, and qualifications of its own members," and not on State laws, which are merely directory as to the time, place, and manner of holding elections, and are resorted to as ancillary for ascertaining the will of the people, which is the great matter to be known.

Mr. L. said that in all the cases he had been able to find, and it had been his business to search with diligence, he had discovered no instance in which an election had ever been set aside by reason of a departure from the directions of the law in the conduct of those who were legally entrusted with the election forms. When the inspectors had not been sworn, it had been sometimes considered that there was no competent authority to receive the votes, and the election had been thus far set aside. But in cases of irregularity in the execution of the law, by those lawfully authorized to execute it, this House

has uniformly inquired what was the actual wrong done, and when ascertained, it has been rectified. Injustice is not presumed from mere irregularities, but it must be proved by something more substantial than mere insinuation or surmise. Simple irregularity, however great, has never been made a ground of itself for disturbing an election, when the authority which held it was properly constituted. There must be some confidence reposed in those empowered to hold elections; but they have no power to deprive those who give or receive votes of their respective rights. The election is one thing, but the manner of conducting it is another. The election is the choice of the people, expressed by their votes, and the rights of the parties depend on them, and not on the manner in which the officers of the election may behave themselves. It is a principle of law and justice, that no man shall be deprived of his right by the negligence or misconduct of a public officer. Whoever complains of any abuse of official discretion, or other omission of duty by public functionaries, to the prejudice of third persons, must show the actual injury done. Where neither those who give the votes, nor those who receive them, have done wrong, they are not to be deprived of their rights by the misconduct of third persons, and this House has uniformly taken care that such misconduct should do no harm. Most of the cases have been those in which members have been improperly sent here by too strict an adherence to the technicalities of the State laws, by sticking in the bark without entering the substance, and this House has rectified such unjust mistakes. These principles were recognised in the case of an honorable gentleman from Vermont, now a member of this House, (Mr. MALLARY,) when it was decided that mere irregularities (and there were many in that case) should not be permitted to defeat the expressed will of the majority, and relief was granted from the unjust operation of a strict adherence to the forms of law. It is of the highest importance to bear in mind the distinction between the *substance* of the election, and the *forms* of the election; else it might be in the power of some one officer, not merely from negligence, but from design, to defeat the will of a great majority of the people, and destroy a whole election. Such a doctrine is too dangerous to be tolerated. The laws and the practice never could have sanctioned such an absurdity; nor can it be supposed that this House would jeopardize its existence in time to come, by the adoption of such a principle. If we were to go by the argument of the petitioner, to infer and take for granted all possible injuries from any and every irregularity, perhaps a quorum of this House would not be found legally elected.

It has been decided in a case from Virginia, where the clerks had not been sworn until the whole election was over, although the law specially prescribed the oath to be taken in advance, that such election was good. In another case from

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21st Congress,  
1st Session.  
Speech of Mr.  
Lea, continued.

1830.  
2d Congress,  
1st Session.

Speech of Mr.  
Lea, continued.

that State, where the law required the clerks to record the names of the voters in a particular manner, so as to enable the polls to be accurately purged, and the true legal votes ascertained, the clerks omitted to perform the duty as prescribed, but the House would not set aside the election for that cause, and the parties had to ascertain the genuine votes as well as they could, by other means. In various cases, where the votes had not been returned until after the times prescribed by law for returning them, and for issuing commissions to those elected, those votes were, nevertheless, received and counted in this House, so as to set aside such commissions. In a case from Indiana, of a gentleman, now a member of this House, (Mr. JENNINGS,) it was decided that the election should stand, although the sheriff had neglected to hold any election at all at two places of voting.

In these cases the House decided that it should not be in the power of those entrusted to conduct elections to defeat them by their own neglect of duty.

Many, and perhaps even stronger cases might be adduced to support this principle; but it would be tedious to enumerate them all, and certainly unnecessary, as none could be found establishing any different doctrine, so as to affect the present case.\*

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\* In the case of Henry K. Van Rensselaer vs. John E. Van Allen, from New York, the second and third grounds stated in the petition were—"2dly. That in the town of Hoesack, also included in said district, the ballot box was not locked, agreeably to law, but was only tied with tape. 3dly. That, at the time of the election, the said John E. Van Allen, who was not an inspector of the election, had in his possession the ballot box of the town of Rensselaerwick, which is also comprehended in said district." The House finally "*Resolved*, That the allegations of the petition do not state corruption nor irregularities of sufficient magnitude, under the law of New York, to invalidate the election and return of John E. Van Allen to serve as a member of this House; and that, therefore, the said John E. Van Allen is duly elected."

In the case of Matthew Lyon vs. Israel Smith, from Vermont, the sheriff neglected to have the election held at two places of voting, viz. the towns of Kingston and Hancock; and these proceedings took place in the House:

"A motion was made, and the question being put, that the House do agree to the following resolution:

"*Resolved*, That, as there appears to have been a sufficient number of qualified voters in the towns of Kingston and Hancock to have changed the state of the election, Israel Smith was not duly elected: therefore, that Israel Smith is not entitled to a seat in this House, as a Representative for the State of Vermont.

"It passed in the negative.

"Another motion was then made, and the question being put, that the House do agree to the following resolution:

"*Resolved*, That Israel Smith is entitled to a seat in this House, as one of the Representatives for the State of Vermont, it was resolved in the affirmative."

In the case of Thomas Spaulding vs. Coles Mead, from Georgia, the House sanctioned the report of the Committee of Elections, which contained this language: "As there is, in the present case, satisfactory proof that the votes of the three counties in question, although the returns thereof were not transmitted to the Governor in season to be considered by him, were originally good, lawful, constitutional votes, having been given by qualified voters on the day, at the places, and in the manner prescribed by law; and as neither the voters who gave them, nor the candidates in whose favor they



How will these cases and their principles apply to the case before the committee?

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21st Congress,  
1st Session.

Speech of Mr.  
Lea, continued.

At one place, the Berry precinct, the box was not sealed, (Mr. L. would call it a box; the law did not say of what *material* the box should be.) If it was not sealed, it was otherwise secured; and, although one means prescribed for ascertaining the true votes was omitted, shall the negligence of the officer, no damage being proved, deprive the voters of their rights? In the case from Virginia the clerks omitted to keep a proper list of the names of the voters, and the true legal votes could not be so accurately ascertained, yet the election was sustained. The increased opportunity for injustice, arising from neglect of the law, did not vitiate that election. He, who impeached its correctness, having failed to show actual, not merely possible, injustice, of course failed entirely. So, in the present case, the officer should have put his seal upon the box, but neglected to do so. Neither those who voted, nor those voted for, had any hand in the matter; and on whom, then, lies the burden of the proof? Certainly on the petitioner, to show that the box was not only insecure, but that it was actually violated. He has not shown this—he could not do so. Indeed, there is satisfactory proof from two of the inspectors, one of whom supported the petitioner's election, that there was no fraud, unfairness, or injustice at that precinct.

Mr. L. then called the attention of the committee to the election at Tazewell. The charge by the petitioner amounts to this, that the ballot box was robbed. His remarks tend to this conclusion, and he cannot stop short of this result without yielding the argument, according to the principles already established; for, even if it were wrong to place the box where it was kept, yet something more than mere possibility is required, and it will not be sufficient to say that the box *might* have been robbed, and thus to presume that it was done. But the proof is full and perfectly conclusive on two particular points: first, that the box was disposed of as the inspectors directed; and, secondly, that it was safely kept. The petitioner, in his remarks on this floor, positively and repeatedly said there was no evidence that the inspectors had directed or agreed for the box to be kept as it was, except by a mere acquiescence after it had been put there. This, to be sure, would be sufficient; but it was astonishing to hear the petitioner make such a statement, when the contrary is expressly and positively proved by several witnesses, sheriff, inspector, and clerks, who say, in the plainest language, that the inspectors did agree for the box to be disposed of as it was, before the sheriff took it away for that purpose. The harsh expressions of the sheriff on that oc-

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were given, have done or omitted any thing on their part to forfeit their respective rights, the committee are of opinion that those votes ought to be allowed."



1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Lea, continued.

casion are readily accounted for in the proof. After the inspectors had given him directions where to put the box, he replied, with warmth, to language concerning it, which he considered insulting to himself. Mr. Lea considered that the inspectors did "take charge" of the box, according to the law, in giving directions how it should be kept; but, whether the law was strictly complied with or not, the box was actually safe, and that is as much as this House has any concern to know. The proof of this is full and incontrovertible. Not one, even of the petitioner's witnesses, has ventured to give a contrary opinion. All think the box was not violated, and that the tickets given in were counted out. But the petitioner has undertaken to sweep all this proof out of his way, by the strength of his own assertions. Although his majority in the box, said to have been robbed, was about 142, and in the other only about 14, and two of the inspectors his own supporters, yet the conduct of all, who have not sworn to suit him, has been assailed in the coarsest and most illiberal manner. The sheriff, in particular, has been an object of most virulent attack. And what sort of man is he, according to the proof? Has any witness told us that he was a man of bad, or even suspicious character? No; not one. Warm-hearted, generous, and liberal, his only fault has been the indiscretion of speaking too freely before those who were capable of seeking an advantage from such trifles. But the inspectors and clerks, also, and other honorable men, are involved in the denunciation. They, too, must be convicted of fraudulent combination and perjury, in order to sustain the petitioner. And who are these men? Are they men of doubtful or desperate character? Men of whom such things might be suspected? No, not one of them. On the contrary, the character of every one of them is sustained in the strongest terms by the petitioner's own witnesses. There is not a man among them of bad character; not one against whom a single individual in the whole district has been found to say one impeaching word. The industry and malignity of the petitioner had not been able to find one solitary person to impeach the character of those men in a single particular. And yet the petitioner had come here, and modestly asked of this House to convict these men (some of one offence, and some of another) of fraud, perjury, and robbery, to sustain him in his unfounded assumptions. He had an easy mode, indeed, of removing evidence out of his way. No matter how positive the statements, or how numerous and unimpeachable the witnesses, he had nothing to do but to give his own assertion that the facts were otherwise, and the witnesses not entitled to credit. Mr. L. said the petitioner had adopted this course concerning various other witnesses and officers in different parts of the district, and in the fury of his declamation, while exhausting himself, he seemed determined also to exhaust the

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Lea, continued.

whole vocabulary of his school of scandal—bribery, and corruption, and robbery, and perjury, and subornation of perjury, and, finally, by way of climax in his tasteful elocution, a delicate figure about swearing horns from the heads of cattle!

Although the conduct of the petitioner, in this discussion, had given cause for mortification to those who felt pride in the character of the people of his State, yet it was a most consoling reflection, that the examination which had been elicited bore so honorable a testimony to the high character of that people in general, and that the facts which the petitioner had brought out with a view of dishonoring those by whom the election was conducted, had been explained in the proof, so as to redound to their credit, and so as to leave not one stain on the integrity of any one of them. This was a far better lecture on the purity of elections than that which the petitioner had delivered in this Hall, and a much more desirable exemplification of that purity than was exhibited, by the evidence, in the petitioner's conduct at home.

Mr. L. said that persons had been assailed on that floor, who were not his supporters in the election, but who were in favor of the petitioner himself. That man, when he conceived it necessary, in pursuing his own sinister and selfish objects, would not spare his own friends. No affection from them, nor gratitude from him, was sacred enough to restrain him in his reckless career of abuse. To defend opponents as well as friends from the shafts of malevolence and ambition, was more than an ordinary service; but (Mr. L. said) he took pleasure in performing it, sustained, as he was, by the whole of the evidence. He felt proud for his constituents, in being able to repeat that the petitioner stood solitary and unsupported in his unsparing calumnies. How could he utter them without apparent shame or remorse, when the proof to contradict and condemn him was spread before him, and staring him in the face? Seldom, indeed, if ever, has this Hall witnessed such manifestations of a disordered intellect, and a still more disordered heart.

Mr. L. said that very few remarks were necessary concerning the election at Unitia, inasmuch as the objection there had been answered already, in what had been advanced relative to other places. The box was placed, by the direction and in presence of the inspectors, in a writing desk, in a storehouse of Francis Shaw. The desk and house were both locked and well secured. The deputy sheriff kept the key of the desk, and the owner of the house the key of the outside door. They are both proved to be men of unquestionable integrity. None can doubt that the box was perfectly safe. The evidence of this is entirely conclusive.

Mr. L. said he regretted that the election at McFarland's had been conducted by any relative of his, however distant;

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 71st Congress,  
 1st Session.

Speech of Mr.  
 Lea, continued.

but the objection on that ground could not be maintained, and was not at all like the case of a judge in court, where the parties were all known, and the matter of mere personal right. In elections the people may vote for whom they please. Until the votes are counted out, it cannot be told for whom they may be. Every man might be, in one sense, regarded as a candidate; at least subject to be voted for. The county court, whose business it is to appoint the inspectors, cannot foreknow who will be candidates or voted for; and all that can be done is to appoint honest men. Such they were who held the election at McFarland's, and the box was taken charge of and kept by the inspectors themselves. There is, therefore, no plausible ground of exception to the election at that place.

The petitioner had charged the sheriff, who held the election at Field's, with receiving a ticket from a revolutionary soldier, and tearing it up, so as to deprive him of his vote; and he said there was proof to sustain the assertion. But it was a very rash assumption, indeed, when there was not one witness who swore that the fact was so, and when the petitioner's own witnesses clearly proved that the character of the sheriff was unimpeachable. To a man, who has no character worth having, it may be a light matter thus to accuse another of deliberate perjury, in violating the duties of his office; but to an honorable man it would be a weighty concern. How can any one, who thus sports with the rights and feelings of others, expect to escape the detestation of every honest man in society?

It was unnecessary to say much concerning the election at McGiannis's, where the inspectors were not sworn. The Committee of Elections did not consider it necessary to decide whether that objection would be fatal to the election at that place. Two of the inspectors voted for the petitioner, who got 122 votes, while only 54 were given to the sitting member, whose aggregate majority would be increased by rejecting the vote at that precinct, according to the practice of the House, wherever the vote of any precinct had been set aside.

Mr. L. said he had now adverted to the principal objections made by the petitioner against the elections at various precincts in the district: and if those objections were to prevail where they appeared to be urged most strongly and to have least absurdity, then the result would be a considerable increase of the majority against the petitioner; but, to allow all his objections, however frivolous or wicked, the majority would, even then, be on the same side. Mr. L. said that, if he had been disposed to find fault, and had taken proof concerning the manner of conducting the election at other places, he might have shown, perhaps, that similar objections could have been urged in relation to places where the petitioner had obtained large majorities. But he had taken

a different course, relying on his own judgment of what would be necessary, and fully persuaded that the petitioner could not have success, even with his own selection of places.\*

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21st Congress,  
1st Session.

Speech of Mr.  
Lea, continued.

Mr. L. said it would seem that the petitioner himself felt confident he could not succeed, and, as a desperate resort to save himself from being entirely abandoned, had found it necessary or convenient to make a profession of his politics, and deliberately to throw into this contest a political firebrand. Why was this? Had he begun to apprehend that no gentleman would vote in favor of his application, unless he could be induced to do so on party grounds? Or did he hope to influence some by introducing this improper feeling of party spirit? His words, indeed, indicated such an apprehension, and such a hope. But he would find that honorable gentlemen on that floor were not as capable of being influenced by such a sentiment as he was of suggesting it. Mr. L. said that although he himself might be regarded as a party man, yet no gentleman had heard him introduce that matter into the present affair. He had studiously avoided the mention of that and other considerations of an inflammatory character. He would scorn to owe a seat there to any decision made on such grounds. He would lose that right arm rather than resort to so dishonorable an artifice.

But the petitioner sets himself up as a martyr, forsooth! a martyr in the cause of a particular party! If it were allowable to give a history of his tergiversations on that head, his claims to such distinction would appear rather ridiculous. He has boxed the political compass with the view of being supported by different parties in turn, until no party can repose any confidence in him—until he deserves to be abandoned even by those who are the most abandoned themselves. Mr. L. would beg leave to ask, and to express a

* L.'s aggregate returned majority . . . . .	217	
A.'s majority at McGinniss's added . . . . .	68	
Would give . . . . .	285	L.'s majority.
A.'s majority at Taxewell added . . . . .	156	
Would give . . . . .	441	L.'s majority.
L.'s majority at Berry's deducted . . . . .	74	
Would leave . . . . .	367	L.'s majority.
L.'s majority at Unita deducted . . . . .	72	
Would leave . . . . .	295	L.'s majority.
L.'s majority at McFarland's deducted . . . . .	139	
Would leave . . . . .	156	L.'s majority.
L.'s majority at Field's deducted . . . . .	47	
Would leave . . . . .	109	L.'s majority.
John Jones's illegal vote for Arnold added . . . . .	1	
Would leave . . . . .	110	L.'s majority.

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21st Congress,  
1st Session.

Speech of Mr.  
Lea, continued.

hope, that no gentleman would regard the petitioner, either politically or personally, as a fair specimen of the people of his country.

Mr. L. said every gentleman would, of course, investigate the case for himself; and if any one should think the seat ought to be vacated, he would vote according to the dictates of his duty. And, if any gentleman should think proper to offer an argument on that side of the question, it was very desirable that he should state distinctly the grounds of his vote, that the points of difficulty might be seen with perspicuity, and abstracted from the scrambling harangue of the petitioner. They might then be met and answered in a manner calculated to give satisfaction.

Mr. L. said he had endeavored to test the present case by principles which had influenced the decisions of this House in time past, and which ought to influence them in time to come. These principles, he thought, had been adopted by the Committee of Elections in the report which they had unanimously made in his favor.

Mr. L. concluded by expressing his obligations to the committee for the attention paid to him while submitting his remarks; and said that he felt himself more particularly called on to do so, in a case so immediately relating to himself.

Rejoinder of  
Mr. Arnold.

Mr. ARNOLD assured the committee that nothing but a sense of duty to himself, and the freemen whom he there represented, could have again induced him to appear before them, asking to be heard. Before my first appearance, Mr. Chairman, at the bar of this House, I had "unequivocal" testimony that some gentlemen had determined to shut their eyes and stop their ears whenever this case was mentioned. You see, Mr. Chairman, that the names of *seventy-nine* members of this House have this day been entered upon the journal as being willing to condemn me unheard. This, sir, numerically, is a formidable list to be selected from among the congregated *wisdom and fidelity* of the whole nation. To this portion of the committee, sir, it would be idle for me to address myself. I feel very thankful, sir, to the majority of this House for the privilege I have now of repelling the foul and unworthy remarks which were levelled at me by the sitting member, in his address to the committee the other day. As to his argument touching the question now before the committee, I should never have troubled this House with a reply to it; for, sir, he never grained the question. His whole argument was evidently intended to make me appear before the public in an attitude unenviable as that in which the testimony in the case makes him. Sir, he seems to think that if the House had been apprised of the nature of my demand, they never would have permitted me to appear at their bar. If the House did not understand the nature of my demand, it was not my

fault. In my first communication to this House, I stated, in as explicit terms as the English language affords, that I did not seek for the seat, but that I sought to vacate it. But, sir, because I do not demand the seat myself, is that any good reason why I, in the name of my fellow-citizens, should be deprived of an opportunity of showing that the sitting member is not legally and rightfully entitled to it? Surely not. What, sir, are the people to be told, because they do not pretend to be *more* than the *people*, they cannot be heard at the bar of this House? Unless they claim the right of being members of Congress, they have no right to be heard here? This may be republicanism, sir, as it comes from the "*pink*;" but if I had advanced such a doctrine, it would have been "federalism dyed in the wool."

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21st Congress,  
1st Session.

Speech of Mr.  
Arnold, in re-  
ply to Mr. Lea.

As I intend to be exceedingly brief, Mr. Chairman, I will pass over a great deal of *stuff* which was whined out at the beginning of the speech, and will come to the charge of having "*clandestinely*" sent to the committee a part of my testimony. Sir, this is a pretty high offence in me, if true. If not true, the offence of him who makes the charge is equally so. That the charge is wholly destitute of truth, I now solemnly aver in the presence of this House, and in the hearing of him who made it. There is no loop, nor peg whereon to hang even the semblance of truth. It is a naked assertion of his, in the very face of the facts. Sir, this charge implicates the honorable Speaker himself as having either winked at the fraud which I practised upon the committee, or having been so culpably negligent as to permit me to smuggle through this House the documents in question. That the honorable Speaker would lend himself to *me* to smuggle documents, or to do any thing else, will not readily, I fancy, be believed by any gentleman on this floor. But if there should be any gentleman inclined to this opinion, the very *manner*, methinks, in which the honorable Speaker presented those documents to the House, ought certainly, if he reflects, to satisfy him that he is mistaken. And I am certain that there was not a gentleman upon the floor at the time but that noticed the honorable Speaker's *manner*, and his *language* too. The documents really seemed to have *provoked* the Chair, as I thought. These documents were presented to this House in the very manner that the first documents were presented. To the manner of presenting them I heard no exceptions. I told the honorable chairman of the Committee of Elections that these documents had been sent to me since my first communication to the House, and desired to know of him what way would be best to present them to the House. He told me to send them to the Speaker, as I had done my first, and let him present them. I did so, precisely as I had done before. They were directed to the Speaker, accompanied by an explanatory letter. If he omitted to examine them, it is not



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21st CONGRESS,  
1st Session.

Speech of Mr.  
Arnold, conti-  
nued.

my fault. But the sitting member complains that I did not send the pamphlet which he calls his first *answer* to these charges. I could give divers very satisfactory reasons why I did not send it; but two, I think, will suffice: 1st. I did not send it to the committee, because it was not sent to me. I had it not. 2dly. What he is pleased to call an *answer*, was merely a broad denial of the charge, and contained the confession of no material facts.

One word, sir, in reply to the remarks of the honorable chairman of the Judiciary Committee on this subject, and I have done with it. The honorable gentleman, (Mr. BUCHANAN,) in the course of his remarks, seemed to feel sensibly the want of a hinge to hang his argument upon, other than that which was furnished him by the testimony. He took the liberty of supplying this deficiency, without regard to the testimony. He states as a fact, that I charged Senator White with having made a DONATION of \$1,077; and then proceeds with a very logical argument to prove that it was a *loan* instead of a *gift*. Now, sir, I positively state that I never did, in pamphlet or in speech, either in Tennessee or on this floor, charge that the \$1,077 was a DONATION; on the contrary, I always represented it as a *loan*; but insisted that a man could be as corruptly influenced by a *loan* as he could by a *gift*. I stated, when at the bar of the House before, that I marked for publication, and desired should be published, the very document upon which so much reliance is placed by the honorable Senator and his friends. The chairman of the Judiciary Committee knows that fact, and I hope he will do me the justice to state it to this House. I call upon him to do so.

The sitting member says that, in estimating the number of votes which I received, I have made a mistake of five hundred. In my estimate, sir, I am governed by the number which I believe were *given* to me, and not by the number his partisans and relations *counted out* to me. I verily believed that I received *a thousand* votes more than were counted out to me.

He says that I am Col. Williams's proxy; a hireling slanderer to harass him. "Heaven save the mark!" I should consider my employment humble, indeed, if it were to slander him. It would be hunting small game, indeed, sir. No, sir; I feel that I am engaged in a much more noble pursuit; I am contending for the constitutional and legal rights of five thousand freemen, who feel that they had been robbed of those rights. These freemen are not ephemeral creatures, sprung up during the darkness of a night, and shrivelled and blighted the next day, before the sun reaches its meridian. No, sir, these freemen belong to that class of people who pay your taxes, and fight the battles of your country. They constitute the bone and sinew of your Government. And as to Col. Williams's hiring a man to *slander*

Pryor Lea, sir, it is truly laughable; almost too ridiculous to be noticed at all. Col. Williams considers him the mere puppet of Monsieur Falcom, who stands behind the screen, "the Punch of the mock drama." And if Col. Williams has ever condescended to notice this Punch, it was not on account of any importance the Colonel attached to him, he may be assured; but on account of "the master wire-worker," who keeps this puppet of his between himself and public indignation. It is true that Col. Williams is one of my friends, and I feel proud of his friendship. His father was a *whig* of the revolution, and his son has acted in strict accordance with the example set by his father. He has always been found on the side of "his country and of his country's friends." The only stain upon his reputation, political or moral, which his worst enemies feign to discover, after having multiplied and magnified, is, *that he will not prostrate himself before the political Juggernaut of the day.*

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Arnold, conti-  
nued..

He (Mr. Lea) says his Tennessee friend feels humbled. Yes, sir, he ought to feel humbled; not because I have *exposed* the corruption of himself and *some* of his partisans, but he ought to feel humbled, because that corruption was *committed*. I was not anxious, sir, to blazon this thing before the world. I was not desirous to expose the venality and corruption even of my enemies, by a public investigation of their evil deeds here.. I was unwilling to consume the time that I know would necessarily be consumed in an investigation. I was unwilling to incur the expense of an investigation; but I was still more unwilling that the constitution and laws of my country should be trampled in the dust, and my fellow-citizens disfranchised. This the sitting member knows, sir. He knows that, when it had been proved that the laws had been violated most flagrantly, both in letter and in spirit, by his friends. He knows, by reason of these violations of the laws, my friends were more excited and discontented after the election, than they were before. Old men have told me since the election, that they felt so sensibly that the laws had been outraged, and they deprived of their dearest right, that they could scarcely sleep for weeks after the election. They felt that they had fought in vain for liberty. They felt as though chains were fastening around them; as though slavery was coming upon them. He knows, sir, with all these things before us, I proposed to him to resubmit the election to the people. Give me an *equal* division of those who were to hold the election, and whatever the result might be, I would calmly submit; otherwise, I should be driven to the necessity of laying my testimony before this body, and should ask for a public investigation. If he had been willing to *trust the people*, he surely would have complied with my request. We could have done every thing I proposed to do, by mutual consent; and then there would have been no doubt as to what was the

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Arnold, conti-  
nued.

will of the people. This could all have been done in a few days, and then every body would have been satisfied. Do you not think, Mr. Chairman, that if the sitting member had believed there was a majority of the district for him, he would not willingly have agreed to leave it to the people again? Then, sir, if he had been elected, he could have rode through the district, and have come here, feeling that all acknowledged he was the choice of a majority; that the laws had not been violated to procure him that majority, but that it had been the spontaneous offering of freemen. I think a man would feel much better in his seat under circumstances like these, than he would if he had skulked into his seat here, knowing that a large portion of his district scowled upon him, and denied that he was elected fairly, and according to the laws of the land. Would you, Mr. Chairman, or any other high-minded and honorable man, occupy a seat under such circumstances? I think I can answer for you, sir, you would not.

He says, sir, that he has to vindicate his own friends and mine, too, from my aspersions! Kind and benevolent gentleman! Whom of my friends have I aspersed or abused? I suppose he means those whom he and his friends have corrupted. I am sorry I had any, but am glad that I had no more in my ranks that could be overcome by such means. Our Saviour, when upon earth, had one *Judas Iscariot* in his twelve disciples. No matter what a man's previous professions may have been, the moment he deserts, and goes over to the enemy, I am authorized to treat him as an enemy. What, sir, shall I vindicate the man who betrayed me to the enemy? Shall I vindicate the man who, for the paltry consideration of *six pieces of silver*, sold the suffrages of his fellow-citizens into the hands of their enemies? No, sir; I leave the work of vindicating a *Judas Iscariot* to the sitting member. It is his vocation. But *I say* to him, in the language of the meek author of our holy religion, "Get thee behind me, Satan."

Although the sitting member talks about *vindicating* my friends, yet, almost in the same breath, he says, if he had been disposed to find fault, he could have proved similar charges upon my friends, which I have proved upon him. This is vindicating my friends with a vengeance. No, sir; my friends want none of his aid; nor do they thank him for his forbearance in not taking testimony to impeach their conduct. They stand in no dread of any testimony he can take, unless he commences a new series of perjury. My friends know that the district has been ransacked from east to west, and from north to south, and nothing was found that could have been tortured into any thing like criminality, or Mr. Lea and his Blount county agent (sheriff Wallace) would never have laid hold of poor John J. Jones with such devouring avidity. This case has been presented to the public

in as many phases as the moon has. It has been swelled and bloated into mammoth consequence, and heralded forth to the world as an unpardonable offence in me, because John J. Jones, who voted for Mr. Lea in 1827, rode my horse to Unitia, to vote for me in 1829. Poor Jones has grown two years and five months *younger* since he voted for Mr. Lea. And I suppose he never will get to be a freeman again, until he agrees to vote for Mr. Lea. But what he loses in his freedom, will, I suppose, be made up in the enjoyment of perpetual youth.

1830.  
21st CONGRESS,  
1st Session.

Speech of Mr.  
Arnold, continued.

The sitting member charges me with having thrown a political firebrand. He managed this part of his subject more ingeniously than is common, but not more disingenuously than is usual for him. Sir, I intended any thing else than to throw a party firebrand. It was the very thing I expected. I knew, if I were disposed to conceal my political sentiments, it were idle, after the sitting member had been for more than a month (to use the language of a distinguished orator and satirist of the day) "*billing and cooing*" through this House. I know that to arouse party feelings and to draw party lines was the anchor of his hope. It is the hobby that he rides at home, sir, under whip and spur, and he has mounted it here.

He says he may be considered a party man, but that I have boxed the compass at all points. Sir, this assertion is entitled to about as much credit as his assertions usually are. I challenge the world to point to one act of political inconsistency in my whole course. The difference between the sitting member and myself is this: I am governed by my principles regardless of men; and he is governed by his men regardless of his principles. *His principles*, did I say, sir? I will retract that, for he has no principles, unless it be principles to follow blindly in the wake of his *Magnus Apollo*. It is true, sir, that I am not a party man: it has always been my proudest boast that I belonged to no party, but to my country. And, sir, since I have been in this great metropolis, and have witnessed the operation of party to paralyze measures calculated to promote the public weal, I feel confirmed in the course I have taken, and better satisfied with myself on the subject of party than ever.

The sitting member says that it would be cruel to deprive him of his seat on account of what the sheriffs or inspectors may have done. He says, if this doctrine is to prevail, it would always place it in the power of a sheriff to defeat an election. Now, sir, I say, if the doctrine contended for by the sitting member prevails, it will place it always in the power of the sheriffs to defeat any candidate. And, sir, which is the greatest evil, and which practice will cure the evil soonest? I say the practice I contend for will cure the evil directly, whereas the one contended for by the sitting member is remediless, and leads to endless difficulties. My

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Speech of Mr.  
Arnold, con-  
tinued.

plan is to hold each candidate responsible for the conduct of his own friends, then every man's friends would be careful not to violate the laws, because he would know that in doing so he would injure his friend, and the cause he wished to promote. Every candidate would admonish his friends to be careful not to violate the laws, "because, if you do, the election is defeated, and it will operate very much to my prejudice," they would say.

The doctrine contended for on the other hand holds out the strongest temptation to violate the laws; for a sheriff may defeat the candidate he hates, and elect his friend by most unhallowed means, and his friend is in no danger, and his enemy has no redress. In this way, a candidate having an overwhelming majority of votes on his side, may be defeated again and again; but he must submit, as the wrong was not done by the opposing candidate in proper person, but it was done by his friends, for whose outrageous conduct he is not to be held accountable, although he is elected by it. This doctrine, sir, I can never approbate. The candidate stands aloof himself, but his relations and partisans go out and commit all sorts of corruption; they commit bribery, perjury, subornation of perjury; they trample the very spirit of the law under foot, and rifle the ballot box. By which unhallowed means they succeed in having their friend returned as elected, when, in truth, an overwhelming majority of the people voted against him. He then gravely tells the people who complain of his conduct, "I have got my commission. It is a very solemn parchment, under the great seal of a sovereign State. I have now a *private* right to my *seat* here, which is not to be disturbed on account of any thing my friends did at the election!" This, sir, is precisely the doctrine.

The sitting member contends that the custom of holding elections in Tennessee is different from that which I insist ought to be the custom under the law of Tennessee. In reply to this, I say, sir, that the testimony does not show that a different custom than that for which I contend has prevailed. But suppose the custom to be against the very spirit of the law, as the sitting member would have it, then I say, sir, it is a bad custom, and the universal rule is, that all bad customs should be abolished.

Mr. Chairman, in the progress of this cause, I may seem to have manifested too much feeling—too much interest. Sir, I do feel deeply interested, interested to the amount of my liberty. I feel that the freemen who honored me with their unbought suffrages are interested to the amount of their liberty. And I feel, sir, that principles on which the fate of this nation may depend are involved in the result of this question.

Mr. ELLSWORTH, of Connecticut, said the principal embarrassment which he felt was in ascertaining the *princi-*



ple upon which he could vote on this contested election ; and it was the *principle* which most concerns the House ; for each case, as it arose, would present its own *peculiar facts*, but the principle would remain to govern in future cases. I like principles in science, said Mr. E., and in political science, too. Like definitions, they are the lights of knowledge, and, if I mistake not, we have a clear and important principle, which will guide us to a true result in this case.

1836.

21st Congress,  
1st Session.Speech of Mr.  
Ellsworth.

The merits of the case are involved in two questions, and only two, viz. how the *electors* of this congressional district complied with the requisitions of the statute law of Tennessee ? and if they have, what is the result of their vote ? A close adherence to these questions will strip this matter of much that is collateral and immaterial. As to the first question, (the difficulty being that the ballot box has not been taken care of by the supervisors of the election,) I observe that the States may prescribe the *time*, *place*, and *manner* of the election, and, beyond that, it is the ultimate province of this House to ascertain the result of the election.

We only want to know what the *electors* have said by their votes ; there may be some difficulty in ascertaining this fact where the supervisors of the balloting are irregular as to *their* duty ; but if the *electors* have done all the State law requires of *them*, and all they can do, legally to express their wishes, this is enough for us, if we can but satisfy ourselves of the result. If we cannot, by reason of the misconduct of the supervisors, ascertain what *was* the true state of the ballot box when the electors *had deposited* their votes, we must pronounce the election to be void. The true principle is, we must find what the electors have done ; they have no control of the box, nor of the election, beyond their going to the box, in conformity to law, and the depositing their vote : at *that* point *their* duties terminate, and *ours* begin ; there is no space between *their* act and a seat in this House ; all that intervenes is only subsidiary to *our* inquiry, ultimately, what is the state of the ballot box ? Congress, as it were, stands to receive the ballots of the electors : to aid us, the supervisors count the votes, and declare the state of them, and send to us a certificate, which is *prima facie* evidence of what the electors have done. But suppose the ballot box should be burnt, or stolen, or improperly secured, after the ballot is finished, shall this misconduct of these intervening ministerial officers deprive the electors of their Representative, provided we *can satisfy* ourselves of the *state* of the ballot by registers ? &c. We are to inquire after the voice of the electors legally expressed ; and if the agents who take and declare the votes, do wrong, let *them* be prosecuted, but not *punish the electors* by rejecting their Representative. Suppose the supervisors do not count the votes, or, fearing the result, after receiving them, thrust them under foot ; if we can find



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Speech of Mr.  
Ellsworth, con-  
tinued.

them, and be satisfied that you have the voice of the electors *legally* expressed, we can safely decide who is entitled to a seat in this House. The case stated from Missouri fully illustrates my views. There the statute required the electors to vote by ballot; they voted, however, *viva voce*, but they could not so vote; the *electors* did not do *their* duty; they did not comply with the law as to the manner of the election. So, too, the case of Allen vs. Van Rensselaer from New York, illustrates the distinction. The law of New York required the ballot box to be locked; it was only tied with a string; in this case Congress decided the election to be good; the *electors* did all *their* duty, and Congress were satisfied as to the contents of the ballot box.

Will it be said that if we have not the evidence which is required by the statute law, we have no evidence, we cannot see at all? I answer, that if the *electors* comply with the law, that is all that is indispensable. Will it further be said this is too loose? I admit it may be loose, and the evidence unsatisfactory, and *then* I would direct another election. But if the evidence is *satisfactory*, shall irregularity in the supervisors defeat the wishes of the people? And if irregularity is to defeat the wishes of the people, I ask, shall *every* irregularity do this? Where will you draw the line? No, sir, the true principle is this. Have the *electors* done all the law requires of *them*? and can we be satisfied of the state of their votes? It would be monstrous injustice to suffer the supervisors of the poll to disappoint and defeat the high and sacred right of suffrage. Sir, let it not be thought I am indifferent to the regulations and safeguard of the law respecting elections. I consider the ballot box to be the *heart* of our political body; it must be pure; the flow of life from it must be uncorrupted. I would encompass the elective franchise with every possible security; but what then? Will you not hear the voice of the people? of the electors? Will you suffer this sacred privilege to be defeated by carelessness or fraud?

Now, as we are all satisfied, in this case, that the *electors* have fully complied with the law in the time, place, and manner of the election, what is there left but the simple matter of fact, viz. the actual state of the ballot box, when the balloting was finished? There gentlemen will suffer according to their views of the weight of evidence; and if I could bring myself to *doubt* as to this main fact, I would not agree with the committee who have reported that Mr. Lea is entitled to a seat in this House. But, sir, I have carefully perused and reperused the evidence on this point, and I must say I have no doubt. I am satisfied with the return of the sitting member. I do not believe any gentleman in this House, were he sitting as a juror to try this simple matter of fact, would hesitate in his opinion that we *do know* what the *electors* have done. Sir, I repeat, that I would most sacred-

ly guard the ballot box while it contains the expression of the people. But I will not punish the people, by refusing to judge what is the expression of their wishes, because, having done *their* duty, the supervisors have been guilty of some irregularities in discharging theirs. I do not think there is before us a particle of evidence to show fraud on the part of the supervisors, nor am I by any means satisfied that there has been any serious irregularity. Perhaps there has been some, but no more than is customary; and although this may be no apology, it helps much in ascertaining the great fact which is so important.

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Mr. HUNTINGTON rose, and spoke in substance as follows: *Speech of Mr.*

*Mr. Speaker:* I have not risen to discuss the numerous points which have been presented to the notice of the House, growing out of the mass of evidence connected with this resolution, nor to comment on some very extraordinary proceedings which attended this election: but to submit a few remarks on one part of these proceedings, which, after the most careful examination, has induced me to believe that this election has not been conducted conformably either to the letter or the spirit of the law of Tennessee; and that the certificate given to the sitting member does not, when brought to the test of those rules which determine the competency and weight of evidence, contain a fair expression of the voice of the electors in the second congressional district in Tennessee.

*Huntington, of  
Conn.*

The observations which I propose to submit to the House, will relate to the proceedings which took place at Tazewell, in the county of Claiborne. The committee state that "it appears from the testimony, that, at Tazewell, in the county of Claiborne, the inspectors, the clerks, and sheriff, holding the election, were in favor of the election of P. Lea, and some of them had made bets on the election: that, on the evening of the first day, after the polls were closed, the inspectors sealed up the ballot box, as required by law, and directed the sheriff to lock it up in some place where it would be safe, and that, with the consent of said inspectors, the same was locked up by him in a trunk, in one of the rooms of the storehouse of Hugh Graham & Co. in Tazewell, where the ballot box had been kept at elections many years before. When these facts were made known to the friends of Arnold, on the same evening, they complained of the ballot box having been deposited there, and wished it removed. The inspectors of the election having dispersed, and left the town, the sheriff declined interfering further with the box. The sheriff kept the key of the trunk, and one of the firm of H. Graham & Co. kept the key of the outside door of the house, which was also kept locked. On the second morning of the election, the inspectors, learning that complaints had been made, sent one of their own body, with the sheriff and one of the electors, after the box. The same was delivered to them,

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continued.

without the appearance of injury. For the purpose of giving entire satisfaction, the inspectors procured another box for the second day's election, and did not unseal the box of the first day until the election closed. When the votes were counted out, it appeared that there was the same number of tickets counted out of the box that had been put in it, as registered by the clerks, and of these the petitioner received a majority of one hundred and forty-two votes, and received a majority of fourteen votes from the box of the second day. It is also in proof that the sheriff frequently said, before the election, that the petitioner should not get a majority in his county, and that he would see to it. There is also evidence showing that the sheriff, upon some occasions, claimed the right of keeping the box, and swore that he would do so; but it is evident, from the proof, that the box was disposed of according to the direction of the inspectors. It is also in proof that the inspectors, the clerks, and sheriff, and all the members of the firm of Hugh Graham & Co. have good characters, and are esteemed as men of integrity and honesty."

The testimony proves, I think, that the sheriff and his son, and one of the firm of H. Graham & Co. had made bets on the election; that though the box was sealed, the lid of it might have been removed, without evincing any violation of the seal. The register of votes kept by the clerks did not show for whom they were given.

Let me ask the attention of the House, while I bring these facts to the only legitimate tests—the law of the State of Tennessee, and the principles of evidence which, in my judgment, ought to govern in the decision of the question now under consideration.

That law provides "that the sheriffs or returning officers shall, on the day and at the place for holding each respective election, be provided with one box for receiving the ballots for Governor and members of the General Assembly: the returning officer, or his deputy, shall receive the tickets in presence of the inspectors, and put each ticket into the box, which box shall be locked, or otherwise well secured, until the election shall be finished. The returning officer shall, at sunset of the first day, and in presence of the inspectors, put his seal on the place to be made for the reception of the tickets, which shall continue until the election shall be renewed the succeeding day; and it shall be the duty of the said inspectors to take charge of the box until the poll is opened the next day, and shall then be taken off in the presence of the inspectors."

Have the directions of this law been observed, either literally or substantially? Though I think some doubt might be entertained, from the proofs taken, whether the consent of the inspectors was given to the disposition which was made of the ballot box, the weight of evidence supports the position, that it was disposed of according to their directions,

and it may be assumed as proved: and the very obvious inquiry then arises, whether the statute of Tennessee authorizes the inspectors, when it provides that "they shall take charge of the box until the poll is opened the next day," to appoint some other person to do it.

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continued.

Is not this a personal trust, which they could not delegate? Is not the performance of it an act of official duty, imposed upon them by the law? Could they empower a third person, not acting under the obligation of an oath, not appointed an inspector of the election, to perform this public trust, with which they had been clothed? Could they have selected a stranger to act in judging of the qualifications of electors, or to perform any other duty, which the public office they then held required them to do? But one answer can be given to these questions; and if these duties to which I have referred, could have been discharged by the inspectors only, could that one, which has an especial reference to the prevention of fraud and the preservation of the purity of elections, be performed by a stranger?

But if the spirit, the object of the legislative enactment be adverted to, it would seem neither could be consulted, but both might be defeated, by allowing other persons than the inspectors to take charge of the box. Why were they required to retain the custody of it? To prevent the perpetration of fraud. They had been selected for their integrity and impartiality, and were to be sworn faithfully to perform their duties at the election, agreeably to the constitution and laws of the State. In them the electors might repose confidence. While the ballot box remained with them, under their control, it was a fair and reasonable presumption that no fraud upon it would be committed. Does the law of Tennessee repose the same confidence in strangers? The inspectors placed the box beyond their immediate control; it was deposited in a place to which they had no access—in a trunk and a storehouse, the keys of which were in the hands of others. The sole object of the statute provision was, by these means, frustrated. The power to violate the sanctity of the ballot box, against the exercise of which the Legislature supposed they had effectually guarded, by requiring the box to be kept by the inspectors, was entirely in the hands of third persons. In my judgment, this act of the inspectors was a clear violation of duty, an obvious disregard of the law under which they acted, though I do not impute to them improper motives, or any corrupt design.

If this be so, what is to be its effect upon this election? I will not say it ought, of itself, to make the election void, though I am strongly inclined to the opinion that it should; for it would seem that the Legislature of Tennessee, in the law referred to, intended to prescribe, as part of the "manner" of holding elections, (which, by the constitution of the United States, they alone can do,) the disposition which was to be made of the ballot box on the evening of the first

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continued.

day's poll, and that, by directing it to remain in the custody of the inspectors, they had necessarily prohibited its delivery to any one, and thus declared that the only evidence, (so far as the custody of the box was contemplated) that the election was held in the "manner" prescribed by law should be proof that the inspectors took charge of the box.

But I do not propose to enlarge upon this point. I think, however, it must be admitted, that where a departure from the provisions of the law is proved, it is indispensable that this House, who are made by the constitution the judge of the "elections" and "returns" of its own members, should, in such a case, be furnished with evidence entitled to full credit, that the forms of law only have been disregarded, and that its spirit has been consulted and followed; otherwise, cases would often occur, in which an election could not be set aside, though the most gross frauds might have been perpetrated. And the burden of proof, the duty of presenting this credible evidence, rests upon the sitting member, who claims to retain the seat, notwithstanding the law has been disregarded; for, in such a case, if, in the absence of proof, it is to be *presumed* the election was conducted honestly, the instances would be few, indeed, in which the member returned would lose his seat. If this ballot box, instead of being placed in the storehouse of Graham, had been left, during the night, in the room where the election was held, without a seal upon it, and in the custody of no one, would it be *presumed* that no fraud had been committed upon it? Would it be necessary to prove, affirmatively, that a fraud had been perpetrated? I should suppose that the most conclusive evidence would be required that it had not been disturbed. And if, instead of being left in the public room, it is deposited where opportunities are afforded, and inducements exist to commit a fraud upon it, will not the same evidence be required as in the case supposed? Will the doctrine that fraud is not to be *presumed*, be admitted?

I proceed now to the examination of another material point, connected with the subject under consideration, which is, whether the evidence reported by the committee is of such a character, and of such weight, as to satisfy the House that no fraud was committed; that the votes found in the box, after the polls were finally closed, and which were counted, were the *same* which were in it at the termination of the first day's balloting.

This evidence is derived from the affidavits of those who, if a fraud was perpetrated, would, probably be presumed to have been parties, or privy to it. I say, if there was a fraud; for I wish not to be understood as expressing an opinion that a fraud was committed. It has, indeed, been said that there is evidence from *other* sources that "a full and fair expression of public opinion has been obtained." The House have been told that the ballot box was sealed at night,



and in the morning appeared not to have been disturbed: the seal was entire, exhibiting no marks of violation. This is true, but it is to be recollected that there is no proof that the seal was such that, if it had been changed, it would have been known. There is no evidence that it was affixed in such a manner as to prevent alteration; that it had any particular mark or stamp which could be identified, and which would have been a security against violation. The statute directs "the returning officer, in the presence of the inspectors, to put *his* seal on the place to be made for the reception of the tickets." What is to be understood by "*his* seal?" Is it not obviously *such* a seal as could not be removed without detection? one which, if violated, could not be replaced? Was the seal which was placed over the aperture of this box, of this description? One of the inspectors, in reply to a question put to him, says, "a square bit of paper was sealed over the hole." And I think this is substantially all that the evidence discloses as to the kind of seal which was used. It is to be remembered, also, that one of the inspectors states, and other witnesses concur with him, that the lid of the box might have been easily taken off without doing the least violence to the seal; and though the statute provides that "the box shall be *locked*, or otherwise *well secured*, until the election shall be finished," it appears to have been fastened in such a manner that no external marks of violence to the seal would have accompanied its removal.

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Huntington,  
continued.

It has been said that when the votes were taken from the box, there was the *same number* found to have been in it as had been registered by the clerks on the preceding day. This fact is proved, but no inference is to be drawn from it that the votes were not *changed*; for no list of the persons, for whom the ballots were given, was kept; and, if the votes were *changed*, as they might have been, it is not very probable the *number* of them would have been altered. If a fraud was committed, it is not to be expected that he who perpetrated it, would have afforded the means of certain detection, by increasing or reducing the *number* of votes which had been registered.

If the resolution reported by the committee be adopted, it must be sustained, in my judgment, by the evidence of those who had the custody and control of the box; who were opposed to the election of the petitioner, some of them having bets depending upon the result of the election, and some of them having declared, before the election, that "the petitioner should not get a majority in his county, and that he would see to it." If the principles by which the credibility of evidence is determined, and which are general in their application, are applied in the present case, can it be said that this evidence is credible? Does it come from a source entitled to our confidence? I do not say that any frauds were



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continued.

committed, that the votes were changed, in the interval between the first and second day's balloting. I do not impeach the general character for integrity which it is proved the deponents possess. I cannot, however, but think that they have placed themselves in a situation which, if the rules which govern in ascertaining the credibility of testimony are regarded, precludes them from being viewed as credible. What was that situation? They not only were opposed to the election of the petitioner, but some of them had wagers depending on the result, and the box was entrusted to their care. Ought reliance to be placed on the testimony of men thus situated in regard to this election? Is credit to be given to those who, if a fraud was committed, had the means of perpetrating it; who had the power, and were under pecuniary inducements to commit it? Why is a *party* to a suit, in the courts of law, excluded from being a witness? Because he is under the strong temptation of interest to swear falsely. Why is a trustee prohibited from being a purchaser of the trust estate, when it is offered for sale at a public auction? Because he *may* defraud those beneficially interested in the property; the law takes from him the power of defrauding, by accompanying the temptation with that which would deprive him of the fruits of his intended fraud. In either case, the character of the party, or the trustee, is not regarded. However pure, the principle is applied equally to them, and to the dishonest. Besides, if frauds were committed, it is not to be expected that those concerned in them would voluntarily disclose, under oath, their agency in them; and they could not be compelled to do it. I again repeat, that I do not say that any one did act fraudulently. I do not say that any one violated the sanctity of that ballot box. I merely say that, in my judgment, the deponents to whom I have alluded, are not credible witnesses, (considering the circumstances in which they had voluntarily placed themselves, and having regard to the principles of evidence which ought to govern in such cases,) to establish certain facts material and necessary to be ascertained.

Every possible guard should be placed around the mode of exercising the elective franchise, to preserve its purity. No "manner" of conducting an election, especially where the law of the State does not authorize it, should be tolerated by this House, which would endanger this purity. I cannot but consider the result to which the committee have come, in the present case, as furnishing a precedent of dangerous tendency; as giving a sanction to a course of proceeding, which may hereafter be much regretted; and, entertaining these views, I cannot concur in that result; I cannot vote for the resolution as reported by the committee, but shall vote for the amendment to it, which declares the seat of the sitting member vacant.

The question having been taken in the House, as heretofore stated, Mr. Lea was confirmed in his seat.

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## CASE LIX.

REUEL WASHBURN vs. JAMES W. RIPLEY, of Maine.

[After the tickets are deposited in their appropriate boxes, where the voting is by ballot, it is not competent, nor proper, either for the voter himself, or the presiding officers, to alter or change the ballots as they were delivered into the boxes.

The intention of a voter is to be ascertained, only from the box in which his ticket is deposited.

The presiding officers should return to the State Executive all the ballots they find in the box which is used for the reception of tickets for members of Congress; but they are justified in refusing to count votes in other boxes, though they may bear the name of a known candidate for Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise.

A ballot containing the names of two or more persons, if given by a qualified voter, may be received and counted as one vote.

DECEMBER 15, 1829.

Petition presented, and referred to the Committee of Elections.

On the 18th of January, 1830, Mr. ALSTON, from that committee, made the following report:

It appears, from the evidence in the case, that an election was holden for the Oxford district, in the State of Maine, on the second Monday in September, 1828, and that said Washburn and James W. Ripley, and others, were voted for as suitable persons to fill that office; and that, by the laws of Maine, a majority of the whole number of votes given was necessary to a choice; and, from the returns, the votes stood as follows:

Report of the  
Committee of  
Elections.

Reuel Washburn . . . . .	2,495	James W. Ripley . . . . .	2,180
Oliver Herrick . . . . .	162	Samuel A. Bradley . . . . .	119
Charles Morse . . . . .	7	Simeon Cummings . . . . .	6
Henry Rust . . . . .	4	John Deering . . . . .	3
James Osgood . . . . .	2	Enoch Lincoln . . . . .	2
Ephraim Woodman . . . . .	2	Jacob Ludden . . . . .	1
N. Howe . . . . .	1	G. French . . . . .	1
Gustavus Hayford . . . . .	1	Benjamin Bradford . . . . .	1
Levi Hubbard . . . . .	1	A. Mellen . . . . .	1
Richard Davis . . . . .	1	Mark Harris . . . . .	1
R. P. Dunlap . . . . .	1	John L. Megquier . . . . .	1
Theodore Ingalls . . . . .	1		
			<hr/>
			2,316
			<hr/>
	2,678		2,678
			<hr/>
			<hr/>

Whole number of votes given . . . . . 4,994

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Committee of  
Elections.

And that, by the laws of Maine it is made the duty of the Governor and Council of Maine to examine the returns made to them in the elections for Congress, and, if there be not a majority of the whole number of votes given to any one candidate, to direct a new election. Upon the return being made to the Governor and Council of the vote as above stated, the Governor and Council ordered a new election to be holden on the 22d of December, 1828, for the said district of Oxford; at which second election the said James W. Ripley received a majority of the whole number of votes given in said district, and received the certificate, and by virtue thereof now holds his seat.

The petitioner now contends that he was legally chosen at the election in September, 1828, and that he received a majority of the whole number of votes then given; and shows that on the same day of the election for Congress, in September, the other elections for State officers took place, to wit, for Governor of the State, for Senators to the State Legislature, for Representatives to the State Legislature, and for county treasurer, at each of the townships and plantations in said congressional district; and that Charles Morse received seven votes from the box in which were deposited the votes for a member of Congress, and that said Morse was a candidate for a Representative of the town of Wilton, in the Legislature, and that the votes given for him were deposited by mistake in the box for members of Congress, and insists that they should be deducted from the whole number of votes given; and, also, insists that the votes given to Simeon Cummings, John Deering, James Osgood, Ephraim Woodman, Jacob Ludden, Gustavus Hayford, Benjamin Bradford, and Richard Davis, were intended to have been given those gentlemen as candidates for the Legislature, and not as candidates for Congress, those gentlemen being at the time candidates for the Legislature; and, also, insists that the votes given to Henry Rust and Alanson Miller were intended to have been given them for the office of treasurer, for which they were candidates, and that, by mistake, they were placed in the box for member of Congress. The two votes given to Enoch Lincoln, to Congress, he also insists was a mistake, the said Enoch Lincoln being then a candidate for the office of Governor, and not resident in the Oxford congressional district, and not eligible as a Representative for that district in the Congress of the United States; and that the same mistake occurred in the votes for Mark Harris, who was a candidate for treasurer of the county of Cumberland; and, also, the votes given to Dunlap, Megquier, and Ingalls, they being candidates for the office of Senator in the same county; and that neither of the last three had a residence in the Oxford congressional district, and are not eligible, by the laws of Maine, to a seat in the Congress of the United States for the Oxford district; and he further insists and proves that

some qualified voter, intending to vote for him for Congress, by mistake put the ticket designed for him in the senatorial box; and that it was counted as a vote for him for Senator in the State Legislature, and not for Congress.

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Elections.

The committee are unanimously of opinion that when the votes are taken by ballot, and separate boxes used, after they are deposited in the box, it is not competent or proper for the voter or selectmen to alter or change the ballot as delivered into the boxes;\* and that the intention of the voter is to be ascertained alone from the box in which his ticket is deposited; and that the *selectmen* conducting the elections at the places above specified, acted correctly in making out their return to the Governor and Council of all the ballots they found in the box which was used for the reception of tickets for a member of Congress, and in refusing to count the votes they found in other boxes with the name of Washburn on it, and adding them to his list of votes given for him as a member to Congress. The adoption of any other rule would be fraught with danger to the purity of the elective franchise.

Votes not to be  
changed after  
they are depo-  
sited in the  
ballot box.

The committee are further of opinion that votes given for persons not residing within the district of Oxford, ought to have been added to the number of votes given for a member of Congress, as they were done by the selectmen.

The petitioner further proves that the said Otis Hayford, by mistake, at the town of Canton, in said district, deposited in the congressional box, a ticket with the names of Howe and French on it, who were candidates for the Senate, in Maine, and, at the time, informed the selectmen of it, and wished to take it out; the selectmen refused him permission to do so, but counted and returned the same as two votes, one given to French and one to Howe, as candidates for Congress; and insists that the two votes should be deducted from the number of votes given. A majority of the committee are of opinion that said ballot should have been counted as one vote, instead of two, it having been given by a qualified voter in said district.

A ballot with  
two names al-  
lowed to be  
counted as one  
ballot.

Said petitioner further insists that, at the town of Bridgton, in said district, a ballot containing three names on it, to wit, the names of Robert P. Dunlap, Theodore Ingalls, and John L. Megquier, was taken from the congressional ballot box, and counted as three votes, to make out the whole number of votes as above stated, and that they ought to be deducted. It is not satisfactorily proven to a majority of the committee, who do not therefore sustain the position assumed by the petitioner, *whether* the said ballot was counted as three votes, or as one vote; or whether the same was counted at all. A majority of the said committee are further of opinion that, if the same was counted as three votes, it

\* See the same point ruled in the case of Draper vs. Johnston, first session of the twenty-second Congress, *post*, 711.

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31st Congress,  
1st Session.

Report of the  
Committee of  
Elections.

Sitting member  
conceives peti-  
tioner to have  
waived his  
right to the  
seat, if he had  
any.

should only have been counted as one vote, and will not change the view of the case taken by them.

It is insisted on the part of the sitting member, that the question as to the first election was properly submitted to the adjudication of the Governor and the Council, under the laws of the State of Maine, and, as they acted upon it, and referred it again to the people, who determined the election on the second ballot, that it is not now competent for Congress to go beyond the last election. The majority of the committee are, however, of opinion that they had the right to go into the first election in September, and have accordingly done so.

The sitting member further insists that, if Mr. Washburn was elected at the election in September, he has, since that time, waived whatever right he may have acquired thereby, because the said Washburn, in the month of January, 1829, was chosen one of the counsellors of the State of Maine, by the Legislature, accepted the same, and was qualified; the constitution of Maine disqualifying any member of Congress from being a counsellor; and it is proven that said Washburn accepted the appointment in January, 1829, and resigned the same in February, 1829; and that his term of service, for which he claims to have been elected in September, did not commence until the 4th of March, 1829. A majority of the committee are of opinion that this would not destroy the right of Washburn, if he acquired any by the election in September. Upon these principles, and with this view of the case, the committee make the following statement of the polls, according to the evidence before them:

The whole number of votes returned to Governor . . . 4,994  
Deduct one therefrom for the ballot given by Otis

Hayford to Howard and French . . . . .	1
	<hr/>
	4,993

Necessary to a choice . . . . .	2,497
---------------------------------	-------

Should the committee be mistaken in not counting the ballot containing three names, then the same should be counted as one ballot, and two other votes will have to be deducted. . . . . 4,994  
Deduct one vote at Canton, and two at Bridgton . . . 3

	<hr/>
	4,991
Necessary then, to a choice . . . . .	2,496

So that in either case the said Reuel Washburn has not a majority of the whole votes given at the first election.

The minority of the committee are of opinion that the whole five votes should be deducted; and if they be correct, the result will be as follows:

Whole vote . . . . .	4,994	1830.
Deduct two at Canton, three at Bridgton . . . . .	5	21st Congress, 1st Session.
	4,989	Report of the Committee of Elections.
Necessary to a choice . . . . .	2,495	

The said James Ripley claimed further time of the committee to enable him to get further testimony in Maine, whereby he would be enabled to prove that many illegal votes were given to Mr. Washburn, which, if deducted from his vote, would prevent him, under any view of the case that might be taken, from getting a majority of the whole number of qualified voters at the election in September. The committee have not thought proper to extend this indulgence to him, believing the same to be unnecessary, from the view taken of the case by them.

The majority of the committee being of opinion that the said Washburn did not receive a majority of the whole number of votes given at the election in September, 1828, and that said Ripley did receive a majority at the second election, in December, 1828, they, therefore, offer the following resolution :

*Resolved*, That James W. Ripley is entitled to a seat in the twenty-first Congress of the United States, as the Representative of the Oxford district, in the State of Maine.

*To the honorable chairman of the Committee of Elections in the House of Representatives in the twenty-first Congress of the United States:*

The grounds upon which my claim is founded, are briefly set forth in my memorial. If I could have had an opportunity to examine precedents and reported cases, it would probably have enabled me to present the claim in a more condensed form, and in a manner more satisfactory to the committee and myself. Laboring under this disadvantage, I have endeavored to apply reason and justice to the positions assumed.

It is provided, in the constitution of the United States, article 1, section 5, that " each House shall be the judge of the elections, returns, and qualifications of its own members."

By an election, is implied a tribunal competent to elect, and a person by law qualified to hold and exercise the duties of the office to which that tribunal has appointed them.

To constitute an election in Maine, the candidate for any office must receive a majority of the votes of the qualified electors, legally given and returned; the result to be ascertained in the manner pointed out by law. At an election for a Representative to Congress, the selectmen of the



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1st Session.  
Petitioner's ar-  
gument.

several towns, and assessors of plantations, are required to preside. Their duty in receiving, sorting, counting, and returning the votes, &c. is particularly described in our statute of the 8th February, 1823, dividing the State into districts, for the choice of Representatives in the Congress of the United States, and prescribing the mode of election, and their returns made conformable to the statute, on the only evidence to be received by the Governor and Council, (to whom the returns are first to be made,) to prove the result.

But, under the aforesaid provision of the constitution, I understand it has been repeatedly decided by the House of Representatives in Congress that they have a right not only to go behind the returns, and correct any errors committed by the returning officers, but also to inquire into the qualifications of voters, in order to detect and punish fraud, and for the purpose of giving effect to the votes of every qualified elector, according to his true intent and meaning, when it can be satisfactorily ascertained.

The cases of Messrs. Mallary and Merrill, Turner and Baylies, I am informed, go this length. In fact, if the returns were conclusive upon Congress, and could not be impeached, the right of the House to judge of the elections of its own members would be a mere nullity; and the people might be cheated out of their rights in a thousand different ways.

Considering the principle therefore to be well settled, that the House have a right to go behind the returns, I would first ask the attention of the committee to the votes returned from the town of Bridgeton, in favor of Robert P. Dunlap, John L. Megquier, Theodore Ingalls, Mark Harris, and Richard Davis, for the office of Representative to Congress. The three first were candidates for Senators in the State Legislature, from the county of Cumberland, and, in conformity to the provisions of our statute, were voted for on one list. And the vote returned for them, as aforesaid, for Representative to Congress, was unquestionably a senatorial ballot, put in through mistake. (See the depositions of Theodore Ingalls, John Willet, and Richard G. Bailey, selectmen of Bridgeton, by whom the fact is fully proved.) This ballot, in my apprehension, ought to have been rejected by the selectmen who presided at the meeting. It could not be counted as three separate votes, without violating one of the first principles by which popular elections ought to be governed, and their purity preserved. Shall an election be defeated by the fraudulent act of one man who dares to put three votes into the same box, for the same office, and at the same meeting? It would be a reproach to the laws of the land if it were so. It makes no difference, whether done by *mistake or design*. The effect is the same. It is a fraud, at all events, upon the public, and upon the candidate whose election is defeated.

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1st Session.Petitioner's ar-  
gument in sup-  
port of his  
claim.

This ballot, it is equally clear, cannot be counted, with propriety, as one vote. If it be considered as a single ballot, for whom shall it be counted, for Dunlap, Megquier, or Ingalls? And who is authorized to determine? Surely it bears evidence of illegality on the face of it. Is it not, therefore, void? If the ballot was put in through mistake, as all the witnesses believe, then it was not intended to have been given for a Representative to Congress, but for Senators in the State Legislature. Is it right, then, and just, to count and allow it as a vote for Representative to Congress, against the intention of the person who put it in? It is hardly possible that Mr. Ripley, or any other person, should seriously contend that this ballot ought to be allowed, in any form, against your petitioner.

The said Harris was a candidate, and, it is believed, the only candidate for treasurer of the county of Cumberland. He did not reside within the limits of Oxford congressional district, and was not by law eligible to the office of Representative to Congress from that district. The selectmen aforesaid all testify that they have no doubt the vote which he received for that office was put in through mistake. It was intended to have been given to him for county treasurer. There is a remarkable coincidence, that the said Harris should receive a vote for Representative to Congress, (not being eligible to the office,) and your petitioner a vote for treasurer of the county of Cumberland, not having the requisite qualifications for the office of treasurer of that county. It is required expressly by our statute, chap. 99, sec. 1, that each county treasurer shall be a *freeholder and resident* in the same county in which he shall be chosen. Having neither of these qualifications, credulity itself cannot be made to believe that the ballot aforesaid for Reuel Washburn was intended to have been given to him for treasurer of Cumberland county. Can there be any doubt that the two votes last named were carried by the same person, and that he made a mistake in dropping them into the box? But as his intention is perfectly manifest, not only from the reasons here stated, but also from the testimony of the selectmen, it is respectfully submitted whether the vote which your petitioner received as aforesaid, in said town of Bridgeton, for county treasurer, ought not to be added to his poll for Representative to Congress, according to the true intent and design of the person who gave it. And inasmuch as it is proved that the vote which the said Harris received as aforesaid, for Representative to Congress, was put in through mistake, as he could not have held the office if he had received more votes than all the other candidates, and as it was evidently designed to have been given to him for county treasurer, it is contended that the same ought not to be allowed against your petitioner.

Richard Davis, who was a candidate for Representative in

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gument.

the State Legislature, and not for Congress, received one vote, according to said report, for the latter office. Here, too, was a mistake. So many elections being held on the same day, and the ballot being taken for both officers at or about the same time, it is not strange that such a mistake should occur. But the fact being sufficiently proved, I am unable to perceive any good reason why this vote should be allowed against your petitioner. (See the depositions aforesaid of Ingalls and Bailey.)

I would next ask the attention of the committee to the votes which, according to said report, were given, in the town of Turner, to his Excellency Enoch Lincoln, for Representative to Congress. He was a candidate for re-election to the office of Governor of said State, and resided at the seat of Government, being an inhabitant of Portland, which does not belong to Oxford district. (For proof, see the depositions of the selectmen and clerk of Bridgeton, the selectmen and clerk of Canton, and of the Hon. William C. Whitney, sheriff of Oxford county.) These votes, it is believed, ought to be rejected. There is a moral certainty that they were designed to have been given to him for Governor, and not for Representative to Congress; and if he was not eligible to the latter office, why should they be counted and allowed, so as to prevent a choice, any more than if they had been blank votes? A ballot given to a person, by law disqualified to hold the office for which it is given, has all the properties of, and in a legal sense is, a blank vote. It will not be pretended that an alien, or an inhabitant of an adjoining State, receiving a majority of the votes given for a Representative to Congress in one of the districts in the State of Maine, could hold a seat as a member of the House of Representatives from that district. If this be correct in the supposed case, the influence seems to be irresistible, that the candidate receiving a majority of the votes given to persons constitutionally eligible, would be elected, and entitled to his seat accordingly.

In the first article second section of the constitution of the United States, it is provided that "no person shall be a Representative who shall not, when elected, be an inhabitant of that State in which he shall be chosen." And in the fourth section of the same article, that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof."

Under this authority, the districting system has been adopted in most of the States; and, in all cases, as I am informed, where this system is in operation, it is required that each Representative shall be an inhabitant of the district for which he shall be elected. In fact, the great argument in favor of the system is, that it will secure a representation from every section of the State, and every class of the com-

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21st Congress,  
1st Session.  
Petitioner's argument.

munity. It is a provision just and wholesome in itself, and accords in spirit and essence with the constitution of the United States. The House will not consider it, therefore, as merely nugatory. (See our statute, passed February 8, 1823, by which it is provided that each Representative in Congress shall be an inhabitant of the district in which he shall be chosen.) The particular attention of the committee is requested to the proceedings at the meeting held in Canton at said election. That the votes given to N. Howe and G. French, in that town, for Representative to Congress, were put in, through mistake, by Otis Hayford, Esq., on one list, being the ballot he designed for the senatorial box, there can be no doubt. It is fully and conclusively proven by the depositions of the Hon. Cornelius Holland, clerk, and Gideon Ellis and Gilbert Hathaway, selectmen of the same town, and the said Hayford himself, that the selectmen erred in refusing to permit the said Hayford to correct his mistake at the time; and, in returning, that the said Howe and French had each one vote for Representative to Congress, is too palpable to admit of argument. I do not charge them with any corrupt design, for I know them to be fair-minded, honorable men, although a majority of them were opposed to my election. It was a hasty decision, made in the hurry of the moment, which they now sincerely lament. And, as honest men, they have, voluntarily, furnished me with their testimony to all the facts within their knowledge in relation to this subject. These votes, it is presumed, for the reasons assigned in relation to the Bridgton votes, will not be allowed against your petitioner. It will be seen, by the testimony of the said Hayford, that he discovered his mistake, in dropping the senatorial ballot into the box for Representative to Congress, at the very moment it was made, and asked permission to take it out, and put in a vote for one of the regular candidates for that office; and if he had been permitted to do so, he would have voted in favor of your petitioner. Here is an elector duly qualified, who in effect tenders his vote to the only persons authorized to receive it, which is arbitrarily refused. Is it not right and just that this vote should be added to your petitioner's poll? Is it in the spirit of a republican Government to suffer its citizens to be deprived of their dearest privileges in this arbitrary manner?

Again, it appears, by the testimony of the said Hayford, that he, by accident, had deposited into the senatorial box the ballot which he designed for Representative to Congress (which was in favor of the said Washburn) prior to the discovery of the mistake before mentioned. He delivered his ballot to the selectmen, intending it for Representative to Congress, and thought it was deposited into the right box, until the aforesaid mistake was discovered. His testimony is full to the point, and he is corroborated by the Hon Cornelius Holland, clerk of the town.

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1st Session.  
Petitioner's ar-  
gument.

Under all the circumstances of this case, I cannot believe that the House will come to a result, which shall deprive this man of his rights of suffrage, and your petitioner of the benefit of his vote, against the honest intention of him, the said Hayford.

Jacob Ludden was a candidate for Representative in the State Legislature, and Henry Rust, for county treasurer. They received, according to said report, one vote each in the town of Canton, for Representative to Congress; but the clerk and selectmen of the town concur in testifying that these votes were put in through mistake, and were, in truth, intended to have been given to them for the offices for which they were candidates, and not for Representatives to Congress. Upon what principle ought they to be counted, against the intention of the persons who carried them?

The other facts stated in my memorial are susceptible of proof; but it is thought to be unnecessary and inexpedient to be at the trouble of taking more testimony, enough having been proved to constitute an election.

Should the ground I have taken be sustained, the following will be the state of the polls. (See copy of the official list, marked A.)

His statement in figures, of the votes given.

Washburn received, according to said report . . . 2,495 votes.

Add to Washburn's poll one vote on account of that which was put in for him into the box for county treasurer, in Bridgeton, the same having been designed for him for Representative to Congress . . . . . 1

Add one on account of said Hayford's vote in Canton, which he designed for Washburn . . . 1

Whole number of votes for Washburn . . . 2,497

Ripley received, according to said report . . . 2,180 votes.

All others . . . . . 319

2,499

The following votes were rejected by reason of illegality, &c.

In Bridgeton. For Mark Harris, 1; Dunlap, Megquier, Ingalls, and Davis, 1 each . . . 5

In Turner. For Enoch Lincoln, 2 . . . 2

In Canton. For N. Howe, G. French, Jacob Ludden, and Henry Rust, 1 each . . . 4

Number of votes rejected . . . . . 11

Whole number of votes against Washburn . . . 2,488

Whole number of votes for Washburn . . . 2,497

Whole number of votes against Washburn . . . 2,488

Majority for Washburn . . . . . 9

I am aware it will be urged that the State Executive has ordered a new election, when a different result was produced, the sitting member having received a majority of the votes at that trial; that the question has been settled by the people, &c. &c.

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Argument of  
the petitioner.

In reply to this, I beg leave to say, first, that the election was ordered without my knowledge or consent. I have yielded none of my rights.

Second. That a new election ought not to have been ordered, according to the construction given by former Executives to our statute prescribing the manner in which returns shall be made. The return from the town of Temple was not attested by the town clerk, which the statute expressly requires. A defect of this kind had hitherto been considered fatal. But if the votes of Temple had been rejected, there would have been a choice. In Peru and Waterford, it appears, from the returns, that the votes were given in *blank* year. But the Governor and Council went out of the returns, or behind the returns, for evidence that they were given on the second Monday of September, A. D. 1828. If the votes of Peru and Waterford had been rejected, there would have been a choice. A return manifestly illegal must be the same as no return at all. Mr. Mallary's case, I am told, settles this point. (See copies of the returns from Temple, Waterford, and Peru, which accompany my petition. See also a copy of the report of the Council on the returns of votes from Oxford district, and the protest of Counsellor Whitney against the acceptance of said report, marked B.)

Third. Immediately after I was informed of the illegal votes given as aforesaid in Bridgeton and Canton, and before the time appointed for the second election had arrived, I filed with the Governor and Council my memorial, claiming at their hands a certificate of my election. (See a copy of said memorial, marked C; also a copy of the report of the Council of 1828, on same, marked D; also a copy of report of the Council of 1829, on the same subject, marked E.) In both reports it is virtually admitted that I should be entitled to a certificate of election to said office, on proving the facts stated in my memorial, provided they were authorized to go into the examination. And it is a little extraordinary that the Council of 1828, who did actually go *behind the return for evidence* that the votes in Peru were given on the second Monday of September, 1828, would not go out of the returns for proof that *illegal votes* were given in Bridgeton and Canton.

In short, there was or was not a choice of a Representative in said district on the second Monday of September, 1828. If there was a choice, the result at the second trial is entirely void—it is of no sort of consequence. The same story of the question having been submitted to the people a



1830.  
21st Congress,  
1st Session.

The petition-  
er's argument  
continued.

second time, with a more perfect understanding of its merits, may be always resorted to in all cases where new elections have been ordered, and different results produced. For example, when ordered by the arbitrary act of the Executive, or in consequence of the returns not being reasonably made, not made at all, or made incorrectly. But in this case a less number of votes was given at the latter than at the first trial; there was not, therefore so full an expression of public opinion at the December as at the September election: in September the whole number of votes given and returned was 4,994, in December 4,772. (See copies of reports of Council, marked F and B.)

I regret the necessity for presenting this question for your consideration; it is one which involves principles deeply interesting, not only to your petitioner, but to the nation, so far as it is important that the purity of elections should be preserved; and with this statement I submit it to the determination of the House, in perfect confidence that the same will be so decided as shall be honorable to them and our country.

It was announced in the public papers, in the fore part of last summer, that I should claim a seat in said House by virtue of said election. I wrote to Mr. Ripley on the 2d day of September to that effect, and requested him to inform me whether he wished to be present at the taking of certain testimony, upon which I relied to support my claim, and if so, when it would best suit his convenience: I also notified him of the times and places of taking the depositions. (See copy of my letter, marked G, and Mr. Ripley's answer, marked H; also, the original notices served upon him, annexed to the depositions of Dr. Ingalls and C. Holland, and the captions of the depositions.) R. WASHBURN.

*To the honorable House of Representatives in the twenty-first Congress of the United States, assembled at the city of Washington on the first Monday of December, in the year of our Lord one thousand eight hundred and twenty-nine:*

Petitioner's  
memorial.

Reuel Washburn, of Livermore, in the county of Oxford, and congressional district of Oxford, within the State of Maine, respectfully represents that, on the second Monday of September, in the year of our Lord one thousand eight hundred and twenty-eight, being the time appointed by law for the choice of Representatives in said Congress from the State of Maine, he was a candidate for the office of Representative in said Congress from the district of Oxford aforesaid. That, according to the report of the Governor and Council, who examined the returns of votes given for said office at said election, he received 2,495 votes; that James W. Ripley received for the same office 2,180 votes, Oliver

Herrick 162, Samuel A. Bradley 119, Charles Morse 7, Simeon Cummings 6, Henry Rust 4, John Deering 3, James Osgood 2, Enoch Lincoln 2, Ephraim Woodman 2, Jacob Ludden 1, N. Howe 1, G. French 1, Gustavus Hayford 1, Benjamin Bradford 1, Levi Hubbard 1, Alanson Mellen 1, Richard Davis 1, Mark Harris 1, Robert P. Dunlap 1, John L. Megquier 1, and Theodore Ingalls 1, amounting in the whole (against said Washburn) to 2,499 votes.

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1st SESSION.

Petitioner's  
memorial and  
grounds of  
claim to the  
seat.

And the said Washburn further represents that, on the same day of September was held the annual election for State officers within said State, to wit, for Governor, Senators and Representatives in the State Legislature, county treasurers, &c., and the polls in many of the towns were open to receive the votes of the qualified voters for each of said offices at the same time. And your petitioner further represents that the said Charles Morse, who received, according to the said report, 7 votes for the office of Representative in Congress as aforesaid, was not a candidate for said office, but a candidate for the office of Representative from the town of Wilton, in the State Legislature, and that the said 7 votes were put into the box which was open to receive the votes for a Representative in said Congress by mistake, and were in fact intended to have been given to the said Morse for the office of Representative in the State Legislature; and such is the fact in relation to the votes given as aforesaid to Simeon Cummings, John Deering, James Osgood, Ephraim Woodman, Jacob Ludden, Gustavus Hayford, Benjamin Bradford, and Richard Davis, all of whom were candidates for the office of Representative in the State Legislature from some town or class within said district; also in relation to the votes given as aforesaid for Henry Rust and Alanson Mellen, who were the candidates for the office of county treasurer for Oxford county.

And your petitioner further represents that Enoch Lincoln, who received two votes in the town of Turner for the office of Representative in Congress as aforesaid, was a candidate for re-election to the office of Governor of said State, and was not, at the time of said election, an inhabitant of Oxford congressional district, and consequently was not, by law, eligible to the office of Representative in said Congress from said district. That Mark Harris, who was a candidate for the office of county treasurer in the county of Cumberland, Robert P. Dunlap and John L. Megquier, who were candidates for Senators from the same county of Cumberland, and, according to said report, received each one vote in the town of Bridgeton (which belongs to Cumberland county and Oxford congressional district) for the office of Representative in said Congress from the district aforesaid, never, at any time, had a residence within the limits of said congressional district, and, of course, were not eligible to said office of Representative to Congress.

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1st Session.  
Petitioner's  
Memorial.

And your petitioner further represents that the county of Oxford is entitled to elect two Senators in the State Legislature, who are, by law, to be voted for on one list or ballot; that the said N. Howe and G. French were candidates for the office of Senators from the county of Oxford; that one Otis Hayford, Esq., an inhabitant of the town of Canton, in said county and district of Oxford, and one of the qualified voters of said town, put into the box which was open to receive the votes for a Representative in Congress as aforesaid, a ballot having the names of N. Howe and G. French upon it, which ballot he designed for the senatorial box, the polls being open for both elections at the same time; and the said Hayford discovered his mistake immediately, before he had fairly got his hand away from the box, and mentioned it to the selectmen of said town, requesting them to grant him the privilege of taking out said senatorial ballot, and putting in a vote for one of the candidates for Representative to Congress, which privilege they refused to grant, and made their return that N. Howe and G. French had each one vote for the office of Representative in said Congress, which votes were, in fact, put in by mistake, as aforesaid, by the said Hayford, and upon one ballot, and are the same votes which were counted and allowed by the Governor and Council, as aforesaid, for the said Howe and French; whereby the said Hayford was not only deprived of his privilege of voting for a Representative to Congress, but, in effect, was compelled to carry two votes against the person to whom he intended to have given his ballot. And the said Hayford, at said meeting in said Canton, by accident and mistake deposited his ballot for Representative to Congress in the senatorial box, supposing, at the same time, that it was the box for Representative to Congress, which ballot was in favor of your petitioner.

And the said Washburn further represents that the county of Cumberland is entitled to elect three Senators to the State Legislature, who are to be voted for on one list, or ballot. That the said Robert P. Dunlap, John L. Megquier, and Theodore Ingalls were candidates for said office of Senators, and in said town of Bridgeton, a ballot bearing their names upon it, was deposited, probably by mistake, in the box which was open to receive the votes for a Representative in Congress as aforesaid; and the selectmen of said town of Bridgeton returned that Robert P. Dunlap, John L. Megquier, and Theodore Ingalls had each one vote for the office of Representative in said Congress, which votes were, in fact, put in upon one list, and by one person, (whose name to your petitioner is unknown,) and are the same votes which were counted and allowed by the Governor and Council in their said report to the said Dunlap, Megquier, and Ingalls.

Now, the said Washburn in fact says that the votes aforesaid, for N. Howe and G. French, the same having been put

in upon one list and by one person; and the votes aforesaid for Robert P. Dunlap, John L. Megquier, and Theodore Ingalls, the same having been put in on one list and by one person, (whether done fraudulently or through mistake,) were clearly illegal, and ought to have been rejected and set aside by the selectmen when first discovered; and if they had been thus rejected, there would have been an election of a Representative to Congress from said district by the people, on the second Monday of September aforesaid, inasmuch as your petitioner would have had a majority of all the votes given and returned for said office.

1830.  
21st Congress,  
1st Session.  
Petitioner's  
memorial.

And the said Washburn further says that the votes aforesaid for Enoch Lincoln, Mark Harris, Robert P. Dunlap, and John L. Megquier, ought not to be counted and allowed against your petitioner; first, because they were not at the time, according to the laws of the State, eligible to the office of Representative to Congress from said district; and second, because it is certain that the votes given to them as aforesaid were not intended to have been given to them for said office, but for other offices for which they were candidates, and to which they were eligible.

And the said Washburn says further that the vote of the said Hayford, deposited as aforesaid into the senatorial box, ought to be added to your petitioner's poll, agreeably to the true intent and meaning of the said Hayford. It is also believed that the votes aforesaid given to Charles Morse, Simeon Cummings, Henry Rust, John Deering, James Osgood, Ephraim Woodman, Jacob Ludden, Gustavus Hayford, Benjamin Bradford, Alanson Mellen, and Richard Davis, ought not to be counted and allowed against your petitioner, because it is well known that they were not candidates for a Representative to Congress, and there is a degree of certainty which does not admit of doubt, that said votes were intended to have been given to them for other offices for which they were candidates, the several elections being held on the same day and at the same time.

Your petitioner, therefore, respectfully claims a seat in the House of Representatives in said Congress, as a member thereof, and prays to be admitted accordingly, and, as in duty bound, remonstrates against the right of James W. Ripley to a seat in the said House of Representatives by virtue of a subsequent election, on the 22d day of December, A. D. 1828.

REUEL WASHBURN.

To the Hon. WILLIS ALSTON,  
*Chairman of the Committee of Elections:*

SIR: The undersigned respectfully asks leave to bring to the notice of the Committee of Elections a few suggestions and remarks, in reply to the memorial of Reuel Washburn,

Reply of the sitting member.

1830.  
21st CONGRESS,  
1st Session.

Reply and argument of the sitting member.

Esq., claiming the seat in the House of Representatives of the United States, which the undersigned now holds by virtue of an election ordered by the Executive of the State of Maine, on the 22d of December, 1828, and agreeably to the certificate of election now in possession of the committee.

The memorialist predicates his claim to a seat in the House of Representatives upon a *prior* election, which took place on the second Monday of September, 1828. The *only* grounds assumed by him, in his memorial, *dated December eighteen, one thousand eight hundred and twenty-eight*, and which he attempts to prove, are, that, by some mistake or error, a ballot was put into the ballot box for Representative to Congress, in the town of Canton, containing the names of *two* persons, which ballot was said to be counted and returned as *two* separate votes, for two distinct persons; and, likewise, that a ballot was put into the box for Representative to Congress, in the town of Bridgeton, containing the names of *three* persons, which ballot, he attempts to prove, was counted for *three* different persons, and returned as such.

The memorialist, in his *present* memorial, contends that several ballots were given in several different towns, for Representative to Congress, containing the names of persons who, he believes, were not, at the time of the election, eligible to the office of Representative; and that they, consequently, ought to be considered not only as void, and altogether inadmissible on the list of votes given in, but that a portion of them ought to be counted for *him*, and placed to *his* credit on the list of votes. In the Canton case, for instance, the memorialist contends that the ballot containing *two* names should be entirely thrown out, or rejected, and not counted at all; and that, in lieu thereof, *one* of the votes ought to be counted for *him*, and placed to *his* credit on the list of votes—a rule of construction, it appears to the undersigned, totally novel and absurd.

It is respectfully asked that, if the committee think it proper to go into *any* inquiry as to the legality or illegality of votes, or voters, in the town and plantation meetings of the district, or to go “beyond” the official returns made by the responsible and legal officers, whether, if the memorialist *fully* proves the fact, in relation to the Canton ballot, *that* ballot ought not, upon every reasonable and just principle, and in conformity with the universal practice in such cases, to be called *one* ballot, and placed and counted with the votes among the scattering ballots. That the memorialist is entitled to the benefit of this ballot, and that it ought to be placed to *his* credit on *his* list of votes, appears, as before remarked, too absurd to require any argument. The most that can be made of it, in his favor, is, the diminution of *one* ballot on the list of votes *against* him.

In the case of the ballot given in the town of Bridgeton, said to contain the names of *three* persons, and counted as



*three* several votes, for *three* different persons, the memorialist relies on the depositions of the selectmen of that town, who presided at the election. Should the committee feel themselves justified in going into an inquiry of this kind, ought not the proof offered to be plain, full, and positive; and ought not even *positive* declarations made by the selectmen, in such cases, to be taken with the utmost caution, and with much allowance, when such testimony militates with, or contradicts, the official record and return made out at the very time of the election, and public declaration of the state of the votes made in open town meeting by the chairman of the selectmen? Would it not be establishing an unsafe and dangerous precedent in the House of Representatives to trust to the vague and uncertain recollection of the presiding officers of towns, after the lapse of a year, when such testimony conflicts with the official record and return? If such testimony were to have weight, would there not be danger that it would be resorted to too frequently by the ambitious or unprincipled, when candidates received nearly an equal number of votes, or in closely contested elections, which take place in every State in the Union, and in almost every district where political parties are nearly equally balanced? It would hold out, it is believed, too great an inducement to fraud, perjury, and corruption. Were a few votes wanting to change the result, would it not be in the power of a candidate, whose rule of moral conduct might be, that "the end justifies the means," to tempt a few individuals, as profligate as himself, to furnish the requisite proof that there was some error or informality in the election; that their votes were either not counted at all, or were placed to the credit of a person for whom they did not vote? Might there not be *some* presiding officers who could be operated upon by similar means, and be induced to furnish testimony that the meeting at which they presided was illegal; or that the records and returns of votes were erroneous, and not to be relied upon as evidence of the correctness of their proceedings? Should such a doctrine be countenanced or sustained; should testimony be received as *proof* from presiding officers or voters, and that, too, from vague recollection, which is always uncertain, and when in contradiction of the official record and return made on the day of the election, it is not at all doubtful or problematical to what results it would finally lead.

1830.  
21st Congress,  
1st Session.

Argument of  
the sitting  
member.

The attention of the committee is respectfully requested to the depositions of the selectmen of the town of Bridgeton. Not a syllable of positive proof is given in relation to the ballot said to contain *three* names, and counted and returned as *three* distinct votes. Two of the selectmen express their belief that such a ballot was found amongst the votes given for Representatives to Congress; one of whom, Mr. Willet, says, "he separated it from the other ballots, and laid it aside."



1830.  
21st CONGRESS,  
1st Session.

Argument  
the sitting  
member.

He “ afterwards took it up, and gave it to Dr. Ingalls, who was town clerk, and was then employed with his pen, and observed to him that it was a mistake. This was the last he saw or knew of the ballot. He had previously shown it to Mr. Bailey, one of the selectmen, observing to him, it was a mistake. *He did not count it either as one or three votes, supposing it a senatorial vote thrown in by mistake.*” He “ did not know at the time that any return was made of this vote. He read the return, but did not notice that a return was made of this vote. The return was made by Dr. Theodore Ingalls, who was chairman of the selectmen, and also clerk of the town.” He likewise states that “ he had no recollection of any separate vote for *any other persons* than Reuel Washburn and James W. Ripley.” It will be observed by the committee, that it is proved by the chairman of the selectmen, as well as by the copy of the official list of votes, that there were not only ballots given in for Messrs. Dunlap, Megquier, and Ingalls, but also for Richard Davis and Mark Harris; showing, conclusively, the liability of a witness to err, when he relies upon memory or recollection of what transpired after so great a lapse of time, rather than upon the unerring and certain mode of relying upon the official record and return, made at the time when the election took place.

Mr. Bailey, another of the selectmen, states, in nearly the same language, his recollection to be similar to that of Mr. Willet. That “ on sorting the votes for Representatives to Congress, he noticed one ballot on which were *three* names; one of which was the name of Theodore Ingalls; the other two *he does not remember.* It was his impression at the time, and he has no doubt, that it was a senatorial vote, and thrown in by mistake. *He did not count it either as one or three votes;* and did not, until since that time, know that any return was made of this vote, but signed the return of votes without reading it, supposing it to have been made out correctly by Dr. Theodore Ingalls, who was chairman of the selectmen, and town clerk.” Mr. Bailey does not recollect that there was any vote given for Mark Harris, which is proved, by another witness and the official returns, to have been the fact. In answer to a question put to him whether he signed the return of votes, and whether he supposes it was returned as he signed it, Mr. Bailey says “ that he signed it, and did not suppose but it was a regular return. He did not read it, but expected it was right.” He likewise testifies that he was in favor of the election of Mr. Washburn.

Dr. Ingalls testifies that he was chairman of the selectmen, and town clerk of Bridgeton, and was one of the three candidates for Senators, in the county of Cumberland. He states, “ that, for Representative to Congress, the votes were as follows: For James W. Ripley, one hundred and five

votes; Reuel Washburn, sixty-eight votes; Richard Davis, one vote; Mark Harris, one vote; Robert P. Dunlap, one vote; John L. Megquier, one vote, and himself one vote." 1830.  
21st Congress,  
1st Session.

To a question put by the memorialist, "whether the facts stated in the body of the deposition, in relation to the votes given at said election, were taken from the records of said town," Dr. Ingalls answers, "that he then was, and still is, clerk of said town, and the facts stated in the body of the deposition, relative to the votes given in, and the persons voted for, *were taken from the records of said town.*" To another question, viz. "Did you ever see the ballot which is supposed to have contained three names? and if not, how did you come to the knowledge that Robert P. Dunlap, John L. Megquier, and Theodore Ingalls, had one vote each?" Dr. Ingalls answers, "*I have no recollection of having seen the ballot. I counted a part of the votes, and then sat down at the clerk's table, and minuted those I had counted, and put the rest down, as the other selectmen gave them off. I do not recollect having seen the vote in question.*" To the next interrogatory, "*Was the vote declared in open town meeting by you, as it was recorded and returned?*" Dr. Ingalls answers, "*It was.*" To the next question, "Have you any reason to suppose that the votes given in for Representative to Congress, for Richard Davis, Mark Harris, Robert P. Dunlap, John L. Megquier, and Theodore Ingalls, were given in by mistake, other than they were candidates for other offices?" he answers, "I am fully of opinion that they were thrown, because those persons were candidates for other offices, and have no doubt but they were thrown by mistake, the votes being previously prepared."

From the foregoing testimony, there can be no reasonable doubt but that the *three* votes given for Dunlap, Megquier, and Ingalls, were put into the ballot box by *three* different persons. The mistake, if it was one, might be made very innocently. In the hurry and confusion of the town meeting, it is most probable that a ballot containing three names upon it was noticed by persons about to provide themselves with ballots for a Representative to Congress; and, without reading the names upon it, it was separated, and three individuals took each a ballot, and deposited it in the ballot box. It was undoubtedly in some such manner that the three senatorial votes were put into the ballot box for Representative. Admitting, then, to the fullest extent, the testimony of the three selectmen of Bridgeton, to what, it is respectfully asked, does it all amount? Is there any thing like *positive* proof that one was given in, *sorted, counted, and returned*, as *three* separate and distinct ballots? That there were votes given for Representative to Congress, in Bridgeton, for several persons who were candidates for *other* offices, is not pretended to be denied. It is believed that there are few or no elec-

1830.  
21st Congress,  
1st Session.

Argument of  
the sitting  
member.

tions take place in Maine without such mistakes being made ; that is, by placing votes intended to be put into one ballot box into another. Hundreds of votes are believed to be given of this description every year, on the day of the State elections, and are invariably counted and returned among what are termed "the scattering votes."

The election law of Maine requires that the selectmen, who make oath to the faithful discharge of their duties, shall preside at the town meetings for the choice of Representatives to Congress. They are to receive, sort, and count the ballots, and declare the state of the votes, in open town meeting ; a record of which is to be made by the town clerk, and a transcript thereof made out and signed by the selectmen, and countersigned by the town clerk : when sealed, an endorsement is to be made upon it, stating what it contains, which endorsement shall be signed by the selectmen, and all of which shall be done in open town meeting.

In the present instance, no other persons could have had possession of, or control over, the ballot in question, but the selectmen, neither of whom pretends, or even intimates, that he separated it, or that he counted it as three separate and distinct votes ; but, on the contrary, the irresistible inference is, from the testimony introduced, that no such ballot was taken, separated, and counted by them, or either of them. The selectmen fully complied with the provisions of the election law, by signing the return, and declaring the state of the ballots, in open town meeting.

The ground assumed by the memorialist, that, because certain persons voted for are not deemed eligible to the office of Representative to Congress, in consequence of their not residing within the congressional district, cannot be maintained. The question of eligibility or ineligibility of persons voted for, *but not elected and returned* to the House, cannot, it is believed, be settled by the House of Representatives. Were this the case, the undersigned would clearly have been elected at the first or September election, inasmuch as the *memorialist himself* was then, and still is believed to be, *ineligible*, as he then held, and now holds, the office of postmaster in the town in which he resides.

Should a candidate be elected and returned as a member of the House, the inquiry as to his eligibility or ineligibility would *then* become a legitimate one, and the House would be authorized to go into and finally settle the question, either for or against the sitting member ; but that would be a totally different case from the one now presented to the consideration of the committee.

All the facts embraced in the case of the memorialist and the undersigned, are simply these : At the September election, 1828, the memorialist, agreeably to the returns of the presiding officers of the several towns and plantations in Oxford congressional district, legally made, wanted *five*

votes of being elected, he having received 2,495 votes. The undersigned received 2,180 votes, and all other persons 319 votes, making 2,499 votes. A new election was ordered to be held by the State Executive on the 22d day of December following; the result of which, agreeably to the official returns, was as follows, viz. For R. Washburn, 2,125 votes; for J. W. Ripley, 2,598 votes; and for all other persons, 49 votes; making a plurality over Mr. Washburn of 522 votes. The undersigned duly received a certificate of his election; and Mr. Washburn, it is believed, after the result of the second trial was known, and not before, applied, by memorial, to the State Executive, claiming the certificate of his election to the House of Representatives, and was refused, for reasons therein set forth. In January, 1829, the month following the last election, the memorialist became one of the candidates for the Executive Council of the State, was elected by the Legislature as such, and accepted the office, as will appear by his letter, of which the following is an attested copy:

1830.  
21st CONGRESS,  
1st Session.

Argument of  
the sitting  
member.

“PORTLAND, *January 17, 1829.*”

“SIR: Having been officially notified by the Secretary of State that I have been elected, by a joint ballot of the two Houses of the Legislature, in convention, a counsellor, to advise the Governor in the Executive part of Government for the current political year, I hereby signify my acceptance, and am now ready to take and subscribe the oaths necessary to qualify me to discharge the duties of that office.

“I have the honor to be, sir,

“With much respect,

“Your obedient servant,

“REUEL WASHBURN.

“HON. NATHAN CUTLER,

“*President of the Senate.*”

After having officially acted as a member of the Executive Council, until near the close of the session, the memorialist addressed a letter to the Governor, of which the following is an attested copy:

“To his Excellency ENOCH LINCOLN,

“*Governor of the State of Maine:*”

“SIR: Sickness in my family renders it necessary for me to return to them immediately. Believing, as I do, that it would be wrong to leave my seat at this Board vacant for any considerable length of time, I have thought it my duty to resign my office as a member of the Executive Council, and I do it accordingly.

“With great respect, sir,

“I have the honor to be, &c.

“REUEL WASHBURN.

“COUNCIL CHAMBER, *February 23, 1829.*”

1830.  
31st CONGRESS,  
1st Session.

Argument of  
the sitting  
member.

The foregoing letters are introduced to show that the memorialist, *himself*, had waived any claims which he might have previously supposed himself to have had to a seat in the House of Representatives; and that, too, nearly *four* months after the September election had taken place. He was elected, as he says in his letter, "a counsellor, to advise the Governor in the Executive part of Government *for the current political year*," which year will not have expired until January, 1830. The *only* reason he assigns for resigning his seat in the Council, is, that "sickness in his family renders it necessary for him to return to them immediately."

The undersigned would respectfully say, in conclusion, that, provided the committee should deem it proper to go into an investigation of what took place in the town and plantation meetings, so far as relates to the legality or illegality of votes, or voters, and, consequently, "beyond," or "back" of the official and legal returns, that, by a construction the most forced, the memorialist could avail himself of the *diminution* of only *one* vote in the town of Canton, and which would *then* leave him in the minority, by *four* votes. As to the Bridgeton case, it would appear to be unnecessary to make an additional remark. If, however, by *any* construction of the depositions of the selectmen, the committee can come to the result that *three votes* were given in on *one* ballot, and *counted, recorded, and returned as three* ballots, for *three* different persons, even in this case there would be a diminution of but *two* votes; but which, without further testimony, would leave the memorialist in a minority, by *one* vote, under all others voted for.

If the reasons offered by the undersigned should not be fully conclusive and satisfactory to the minds of the committee, which he cannot but believe they will be, he would respectfully request a postponement of the report of the committee for a reasonable length of time, to enable him to send for testimony; much of which it was impossible for him to procure before leaving Maine; by which testimony, it will be satisfactorily proven that there were several ballots given for the memorialist, counted and returned for him, which were given by persons who were not legally qualified to vote in the election, and which, if they were rejected and thrown aside, would leave the memorialist several votes in the *minority*. It can also be proven that one town, containing about fifty voters, and all of whom, it is believed, were prepared to carry their votes for the undersigned, were deprived of the privilege of doing so, in consequence of some supposed informality in the mode of notifying the meeting.

The memorialist has named in his statement accompanying his memorial, two or three towns in the district, the returns of which appeared to be somewhat informal. Similar cases occur every year. The State law requires that

lists of voters shall be posted up in the several towns and plantations, previously to the day of election, but it is believed that a large portion of the towns in the State have omitted doing so. If the committee are satisfied that there was no fraud or corruption intended or practised, and that there was a fair expression of the public voice, it is believed they will not be disposed to resort to legal and nice technicalities, when the effect would be to deprive the elector of one of his dearest rights and privileges.

All which is respectfully submitted.

JAMES W. RIPLEY.

HOUSE OF REPRESENTATIVES, *December, 1829.*

The foregoing report was committed to a Committee of the Whole House, and, after having been for several days under discussion, the House, on the 28th of January, 1830, refused to the said committee leave to sit again.

On the 2d of February, the House, by a vote of 111 to 79, concurred in the resolution contained in the said report.

So the said James W. Ripley was declared to be entitled to his seat in the House.

1830.  
21st CONGRESS,  
1st Session.

Sitting member  
confirmed in  
his seat.



## TWENTY-SECOND CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. CLAIBORNE, of Va.  
RANDOLPH,  
HOLLAND,  
GRIFFIN,

Mr. BETHUNE,  
COLLIER,  
ARNOLD.

[NOTE.—On the 29th of December, 1831, the Speaker laid before the House certain depositions in relation to the election of William Fitzgerald, of Tennessee, which were excepted to by David Crockett, though no memorial or petition was presented by him. These depositions were referred to the Committee of Elections. Their object appears to have been to prove certain irregularities at the polls, and a disregard of the law, in relation to the custody of the ballot box.

No report was made on this case; and on the 6th of February, 1832, the committee was, by order of the House, discharged from the further consideration of the subject.]

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### CASE LX.

#### JOSEPH DRAPER vs. CHARLES C. JOHNSTON, *of Virginia.*

[Sons unmarried, who are living with their mothers, or with younger brothers and sisters, in the absence, or after the death of their father, having the charge of, and providing for, the family, are to be deemed "house-keepers and heads of families," within the meaning of the constitution of Virginia.

Where a person keeps house, having a woman living with him as his wife, he is entitled, as the "head of a family," to vote; and the committee will not inquire whether he is legally married or not.

Persons having a mere equitable interest in lands, are not deemed possessed of an "estate of freehold in land," so as to entitle them to the right of voting.

Where property is owned and possessed by the son, who pays the taxes on it, though it is assessed in the name of the father, yet the son has the right of voting in virtue of it; but it is otherwise, if the tax be assessed to, and paid by the father.

The sheriff, as collector of the taxes, has, by law, a right to return insolvent debtors, who have not paid their taxes, "delinquent;" yet, if he fail to do so, and pays the tax himself, such payment will enure to the benefit of the party, so as to entitle him to a vote.

A person can vote only in the county where the land lies on which he offers to vote.

Where a voter is first polled, and his vote first recorded for one candidate, he cannot afterwards change and transfer it to another; and having once voted for State officers only, he cannot again come forward and vote for a Representative in Congress. 1832.  
22d Congress,  
1st Session.

The polls cannot be kept open more than three days inclusive.

The law requiring votes to be returned within a limited time, is *directory* only, and, if they are not returned by the time, the election is not thereby vitiated; they may be received afterwards.

The assessment and payment of taxes, required as a qualification by the laws of Virginia, is to be for the year preceding, and not for that on which the election is held.

The neglect of election officers to take the oath required by law, will vitiate the poll for the county, or precinct, in which such officer acts.

Where such oath is required, it will be presumed to have been taken, unless the contrary appears; and the *onus probandi* will be thrown upon him who alleges the omission of it: but as the law of Virginia requires a record of the oath to be made in the clerk's office, a certificate from the clerk, that it has not been filed, may be sufficient to shift the burden of proof upon the other party.

The sheriff, being required by law to appoint "writers" to take the polls, held that he cannot dispense with such appointment, and perform the duty himself.

Election officers appointed by a court having the general power of appointment, and acting *co'ore officii*, will be presumed to have been well appointed.]

APRIL 13, 1832.

Mr. COLLIER, from the Committee of Elections, made the following report:

The committee to which was referred the petition of Joseph Draper, contesting the seat of Charles C. Johnston, the sitting member from the congressional district in Virginia composed of the counties of Russell, Scott, Wythe, Lee, Tazewell, Grayson, and Washington, respectfully report:

That they have fully examined the said petition and the voluminous accompanying documents, and have also heard the parties (who have personally appeared before them) upon all the points which they have respectively deemed material. That the petitioner contests the election of the sitting member upon the following grounds: Report of the  
Committee of  
Elections.

1st. That the petitioner received a greater number of votes from voters legally qualified. Petitioner's al-  
legations.

2d. That, by the laws of Virginia, an election can only be continued for three days, whereas, in the county of Washington, in said district, the polls were kept open for four days; and that, if the votes given on the fourth day were excluded, the petitioner would have a majority over the sitting member.

3d. That the officers conducting the election in that county were not duly qualified according to law.

1852.  
23d Census,  
1st Sess.

Report of the  
Committee of  
Elections.  
Allegations of  
petitioner.

4th. That the polls in Washington county were not ad-  
journed from day to day, by proclamation, as required by law.

5th. That the superintendents of the different precinct  
elections in Washington, Russell, Lee, and Scott counties,  
were not legally appointed and sworn.

6th. That the poll books in Russell county were not re-  
turned to the clerk's office of that county, according to law.

7th. That the mode of conducting the election in Wash-  
ington county was not uniform; for at the court-house and  
at the Three Springs, persons residing out of the county  
were permitted to vote, although not freeholders in the coun-  
ty, while, at the precinct election in another part of the coun-  
ty, persons similarly situated were not permitted to vote.

8th. That, by the laws of Virginia, when voters fail to ap-  
pear and give their votes, proclamation having been made  
three times at the door of the court-house, or other place of  
holding such election, by the officers, requiring those who  
had not been polled to come in and give their votes, it is the  
duty of the officer to conclude the poll. That, on the *fourth*  
*day* of election in Washington county, after twelve votes  
had been polled, more voters failed to appear, and the offi-  
cer conducting the election, although requested, refused to  
close his poll, at which time the petitioner had a majority.

The committee further report that, by the returns of the  
canvass and poll lists in the counties which compose the said  
district represented by Mr. Johnston, certified copies of  
which have been furnished, it appears that the sitting mem-  
ber received in

Official returns of votes given.	Russell county, . . . . .	347 votes.
	Scott do . . . . .	495
	Wythe do . . . . .	43
	Lee do . . . . .	342
	Tazewell do . . . . .	208
	Grayson do . . . . .	44
	Washington do . . . . .	1,270

Making the aggregate number of votes in the  
district given for Mr. Johnston . . . . . 2,749

And that the petitioner, Joseph Draper, received in	
Russell county, . . . . .	247
Scott do . . . . .	115
Wythe do . . . . .	786
Lee do . . . . .	265
Tazewell do . . . . .	392
Grayson do . . . . .	750
Washington do . . . . .	116

Making the aggregate number of votes in the  
district given for Mr. Draper . . . . . 2,671

And giving to the sitting member a *majority*  
over the petitioner, of the difference of . . . . . 78

It further appears, by the returns, that the polls were closed in all the counties in the district, except in the county of Washington, on or before the evening of the third day, and that, upon the *fourth day*, in the county of Washington, 86 votes were polled for Mr. Johnston, and only 1 for Mr. Draper, and this had previously been rejected as a vote by a person not qualified; and it became necessary, therefore, for the committee to determine whether, under the existing election laws of Virginia, the polls could properly be kept open for the election of Representatives to Congress for more than three days.

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The 17th section of the Virginia general election law of 1831 provides that, if the electors are so numerous that they cannot all be polled before sunsetting, or if, by rain, or rise of watercourses, many of the electors are hindered from attending, the sheriff and superintendents of the election may, and shall, by request of any one of the candidates, &c. *adjourn* the proceedings on the poll "*until the next day, and so from day to day for three days*, Sundays excluded, giving public notice thereof by proclamation, &c. &c.; but if the poll to be held at any such election is not closed on the first day, the same shall be kept open *two days thereafter*."

Election law  
relative to  
keeping the  
polls open.

It is contended by the sitting member that, by a fair construction of this section, the polls are to be *adjourned* from day to day for three days, and that the first day is to be excluded, in computing the three days. And he further contends that, under the 58th section of the same act, the election for members of the House of Representatives of Congress being required to be held "in the manner, and according to the principles prescribed by the law now (then) in force in relation thereto," even if it were conceded, as it was not, that the polls for the members of their State Legislature could not be kept open more than three days, yet, as the *previous* election law did authorize the polls to be kept open for four days at the least, the polls for Representatives to Congress might legally be kept open for four days.

The committee were, however, of opinion, upon full reflection and examination of the subject, that the Legislature of Virginia, by the provisions of the 58th section, did not intend to have the polls kept open for the election of Representatives in Congress beyond the period requiring them to be closed as to the election of Representatives to their State Legislature; but that the entire polls were to be opened and closed at the same time; and, being further of opinion that the polls, under the act of 1831, could not legally be kept open for any purpose for more than three days inclusive, an opinion which they found greatly strengthened and confirmed by the provisions of the 29th section of the same act, which makes it the duty of the canvassers, in certain special elections there specified, to *meet upon the fourth day*, and

Polls not to be  
kept open  
more than 3  
days.

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compare their poll lists, and certify as to who is elected, &c., and by other considerations, which it is not deemed material to mention, came to the conclusion that the votes given upon the *fourth day* ought to be rejected.

They think it proper to add that it has been recently determined by the Senate of Virginia, that an election for members to the State Legislature cannot, under this law, be continued for more than three days inclusive.

If there had been no further objections to the polls upon either side, this decision of the committee would have given the seat to the petitioner; but as numerous objections were taken upon each side to the qualifications of particular voters, of which due notice had been given by the respective parties, specifying the names of the voters, and the objections, and also to the regularity of entire polls and separate elections, it became necessary to examine these objections.

Upon whom  
the burden  
of proof rests  
where votes are  
impeached.

As to the qualifications of the voters, *the parties*, in the outset, assumed a principle by which they have been governed throughout, different from what would have been adopted by the committee, and which has occasioned great trouble and delay. It was assumed that if a vote was objected to upon the ground that it was by a person not duly qualified, the party claiming the vote must take the burden of proving, affirmatively, that the voter possessed the required qualifications. This erroneous principle, as the committee deem it to be, (for they would have taken a vote received by the board of inspectors as *prima facie* good,) might and would have been reversed and corrected, were it not that the parties, acting upon this basis, proceeded to stipulate,\* in writing, that the votes thus objected to, and not, therefore, proved to be good, were to be deemed and considered bad, reserving, however, in the counties of Wythe and Grayson, the right to the party claiming the vote to prove it to be given by a person duly qualified; and, in the other counties in the district, Russell, Scott, Lee, Tazewell, and Washington, the written stipulation reserved no right to prove the votes to be good; but the specified votes were admitted, unconditionally, to be bad.

Of the effect of  
the agreement  
of parties as to  
votes.

The committee, however, were of opinion that, although there was no express reservation in the last named counties, yet, if affirmative and satisfactory proof should be offered, showing that the votes objected to were, in point of fact, given by persons duly qualified to vote, that the parties would have no right to stipulate that such votes should be disregarded; and that the stipulation would be only received as *prima facie* evidence of the want of the necessary qualifications of the voters.

\* In the case of Porterfield vs. McCoy, it is declared by the committee that the rights of voters cannot be enlarged or restricted by any agreement of parties. See *ante*, p. 267.

Objections were taken, by the respective parties, to individual specified votes, as given by persons not qualified; to no less a number than 1,287, and the causes of objection were set forth; and of that number, by the stipulation of the parties, the following deductions were to be made, as for votes given by persons not duly qualified, viz..

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Votes except-  
ed to by par-  
ties.

To be deducted from Mr. Johnston's poll, *admitted to be bad*:

In the county of Russell . . . . .	125
Scott . . . . .	30
Wythe . . . . .	3
Lee . . . . .	56
Tazewell . . . . .	22
Grayson . . . . .	8
Washington . . . . .	72

Aggregate number of votes to be deducted from

Mr. Johnston's poll, *admitted to be bad* . . . 307

To be deducted from Mr. Draper's poll for votes *admitted to be bad*, as given by persons not qualified:

In the county of Russell . . . . .	74
Scott . . . . .	7
Wythe . . . . .	52
Lee . . . . .	75
Tazewell . . . . .	22
Grayson . . . . .	66
Washington . . . . .	16

And for one person *voting twice* . . . . . 1

Aggregate number of votes to be deducted from

Mr. Draper's poll, *admitted to be bad* . . . 313

In several of the counties of the district, special cases were stated, showing the situation and qualifications of particular voters objected to, and, upon the cases agreed, the committee rejected the following votes:

From Mr. Johnston's poll—

In Tazewell county . . . . .	14
Scott do . . . . .	1
Washington do . . . . .	8

23

And they have rejected, upon the special cases agreed, from Mr. Draper's poll—

In Tazewell county . . . . .	15
Grayson do . . . . .	6
Russell do . . . . .	1
Wythe do . . . . .	3
Two other cases . . . . .	2

27



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The committee, supposing, as they have above suggested, that the parties in their stipulations had adopted an erroneous principle, have given them a liberal indulgence as to time, to enable them to furnish proof as to the qualifications of the voters objected to, and finally fixed upon the 24th day of March as the limit within which the testimony should be taken, allowing however sufficient time thereafter for the depositions to reach the committee, by due course of mail, before the committee should report to the House.

Under this arrangement the parties have proceeded to take further testimony, and the committee have now satisfactory evidence that the following votes upon Mr. Johnston's poll, previously objected to, and admitted to be bad, were given by persons duly qualified, and ought therefore to be added to his poll, viz.

Votes to be added to petitioner's poll.

In the county of Russell . . . . .	49
Tazewell . . . . .	5

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54

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And that the following votes, previously objected to, and admitted to be bad, upon Mr. Draper's poll, were given by persons duly qualified, and ought therefore to be added to his poll, viz.

In the county of Wythe . . . . .	31
Grayson . . . . .	12
Russell . . . . .	23
Tazewell . . . . .	11
Lee . . . . .	4
Washington . . . . .	1

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82

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The next objection taken by the petitioner is, that the officers conducting the election in the counties of Washington, Russell, Lee, and Scott, were not appointed and sworn according to law. Upon this subject the committee have supposed that, as the law requires certain oaths to be taken before the officers enter upon the performance of their respective duties, the committee are to presume that such officers were duly qualified according to law, and the fact is affirmatively shown in all the counties specified except Lee, and, in relation to that county, there is no evidence, either affirmative or negative, and the fact is therefore assumed that they were duly qualified.

Officers acting  
colore officii,  
presumed to be  
duly appointed.

As to the regularity of the *appointment* of the officers, the committee are of opinion that it is sufficient that the officers acted *colore officii*, and that no other persons claimed the right; and that inasmuch as it appears in the case relied upon by the petitioner, and particularly specified in his petition, that the officers or superintendents alluded to were

appointed by the court having a general power to make the appointment, the committee will not inquire as to the regularity of the proceedings of the court in this behalf; they will observe, however, that if the objection were tenable, it equally applies to other cases where the petitioner obtained majorities.

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Elections.

The next objection taken by the petitioner to the regularity of the adjournment of the polls in Washington county is perhaps well taken, but as the objection only applies to the fourth day, which votes are excluded upon a different principle, it is not now deemed material.

The committee are of opinion that the neglect to return the poll books in Russell county within the time specified by law, will not vitiate the election, particularly as the poll books were then in the hands of the agent of the petitioner.

Neglect to re-  
turn the poll  
books does not  
vitate the  
election.

This disposes of all the objections taken by the petitioner, and the result of the decision of the committee would be that the petitioner would be entitled to the seat agreeably to the prayer of the petition, but for certain objections taken by the sitting member to the entire polls in particular precinct elections, specified in a notice duly served upon the petitioner, which the committee now propose to consider.

By the election laws of Virginia, in some of the counties the election for the whole county is holden at the court-house, where all the votes for the county are polled; in other counties designated, separate polls are holden at the same time in different parts of the county. In the former case, the sheriff, or, in his absence, the under-sheriff, or other proper officer, or the mayor of the city, &c., is to cause the poll to be taken publicly at the court-house, &c., without the aid of any superintendents, &c.; and where separate polls are to be holden in different parts of the county, the county courts are annually to appoint five discreet and intelligent freeholders, residing in the neighborhood of the place of holding each separate poll, any two or more of whom are to superintend the taking such separate polls. Where a separate poll is to be held, the high sheriff is required to appoint one of his deputies to attend such separate poll, who is to carry with him a copy of the property and land books, and who is to perform, at the separate election, all the duties required of the sheriff conducting an election at the court-house, except that, in the admission or rejection of votes, and in the adjournment of the polls, he is to be governed, not by his own judgment, but by the decision of the superintendents.

Provisions of  
the election  
law of Virginia.

The law further provides that "it shall be the duty of every sheriff or other officer, before he commences taking the poll, or otherwise conducting any election, to take and subscribe, before some justice of the peace, the following oath: "I, A B, do solemnly swear, that in conducting the election, &c., I will, to the best of my skill and judgment,

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The committee, supposing, as they have above suggested, that the parties in their stipulations had adopted an erroneous principle, have given them a liberal indulgence as to time, to enable them to furnish proof as to the qualifications of the voters objected to, and finally fixed upon the 24th day of March as the limit within which the testimony should be taken, allowing however sufficient time thereafter for the depositions to reach the committee, by due course of mail, before the committee should report to the House.

Under this arrangement the parties have proceeded to take further testimony, and the committee have now satisfactory evidence that the following votes upon Mr. Johnston's poll, previously objected to, and admitted to be bad, were given by persons duly qualified, and ought therefore to be added to his poll, viz.

Votes to be ad-  
ded to petition-  
er's poll.

In the county of Russell . . . . .	49
Tazewell . . . . .	5
	—
	54
	==

And that the following votes, previously objected to, and admitted to be bad, upon Mr. Draper's poll, were given by persons duly qualified, and ought therefore to be added to his poll, viz.

In the county of Wythe . . . . .	31
Grayson . . . . .	12
Russell . . . . .	23
Tazewell . . . . .	11
Lee . . . . .	4
Washington . . . . .	1
	—
	82
	==

The next objection taken by the petitioner is, that the officers conducting the election in the counties of Washington, Russell, Lee, and Scott, were not appointed and sworn according to law. Upon this subject the committee have supposed that, as the law requires certain oaths to be taken before the officers enter upon the performance of their respective duties, the committee are to presume that such officers were duly qualified according to law, and the fact is affirmatively shown in all the counties specified except Lee, and, in relation to that county, there is no evidence, either affirmative or negative, and the fact is therefore assumed that they were duly qualified.

Officers acting  
*colore officii*,  
presumed to be  
duly appointed.

As to the regularity of the *appointment* of the officers, the committee are of opinion that it is sufficient that the officers acted *colore officii*, and that no other persons claimed the right; and that inasmuch as it appears in the case relied upon by the petitioner, and particularly specified in his petition, that the officers or superintendents alluded to were

appointed by the court having a general power to make the appointment, the committee will not inquire as to the regularity of the proceedings of the court in this behalf; they will observe, however, that if the objection were tenable, it equally applies to other cases where the petitioner obtained majorities.

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The next objection taken by the petitioner to the regularity of the adjournment of the polls in Washington county is perhaps well taken, but as the objection only applies to the fourth day, which votes are excluded upon a different principle, it is not now deemed material.

The committee are of opinion that the neglect to return the poll books in Russell county within the time specified by law, will not vitiate the election, particularly as the poll books were then in the hands of the agent of the petitioner.

Neglect to re-  
turn the poll  
books does not  
vitate the  
election.

This disposes of all the objections taken by the petitioner, and the result of the decision of the committee would be that the petitioner would be entitled to the seat agreeably to the prayer of the petition, but for certain objections taken by the sitting member to the entire polls in particular precinct elections, specified in a notice duly served upon the petitioner, which the committee now propose to consider.

By the election laws of Virginia, in some of the counties the election for the whole county is holden at the court-house, where all the votes for the county are polled; in other counties designated, separate polls are holden at the same time in different parts of the county. In the former case, the sheriff, or, in his absence, the under-sheriff, or other proper officer, or the mayor of the city, &c., is to cause the poll to be taken publicly at the court-house, &c., without the aid of any superintendents, &c.; and where separate polls are to be holden in different parts of the county, the county courts are annually to appoint five discreet and intelligent freeholders, residing in the neighborhood of the place of holding each separate poll, any two or more of whom are to superintend the taking such separate polls. Where a separate poll is to be held, the high sheriff is required to appoint one of his deputies to attend such separate poll, who is to carry with him a copy of the property and land books, and who is to perform, at the separate election, all the duties required of the sheriff conducting an election at the court-house, except that, in the admission or rejection of votes, and in the adjournment of the polls, he is to be governed, not by his own judgment, but by the decision of the superintendents.

Provisions of  
the election  
law of Virginia.

The law further provides that "it shall be the duty of every sheriff or other officer, before he commences taking the poll, or otherwise conducting any election, to take and subscribe, before some justice of the peace, the following oath: "I, A B, do solemnly swear, that in conducting the election, &c., I will, to the best of my skill and judgment,

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admit all persons to vote entitled to do so, and reject all not so entitled: that I will not persuade or otherwise attempt to influence the vote of any person, or be guilty of any partiality for any candidate or person voted for; and that, as far as depends on me, I will make a just, true, and fair return of the result of said election according to law." The justice, before whom this oath is taken and subscribed, is to return it to the clerk of the county to be filed. The 12th section of the act provides that "the officer conducting such election shall appoint such and so many *writers* as he shall think fit, who shall respectively take an oath, to be administered by him, or make solemn affirmation, that he will take the poll faithfully and impartially. He shall deliver a poll book to *each writer*," &c., *who* shall enter the names, &c., &c.

If the sheriff is  
not sworn, his  
acts are illegal.

At a separate poll holden at the house of *Peter Gnively*, in the county of Wythe, Thomas J. Davis, a deputy sheriff, attended and conducted the election, and it appears, by his own deposition, that he was *not sworn*. The committee are of opinion that this omission vitiates the polls taken by him, although he *now* swears that "he conducted the election impartially and legally, according to the best of his knowledge," a decision which they suppose to be in conformity with the previous decisions of this House. At this election there were 43 votes given for Mr. Draper, and 19 for Mr. Johnston.

At the election held at the *court-house*, in *Wythe* county, Leonard Phelps, a deputy sheriff, attended and conducted the election. John H. Saxton was appointed a clerk or "*writer*," and took the oath required as to keeping the polls. Before the polls were closed, however, upon the first day, he absented himself, and the deputy sheriff swears "that, in consequence of the clerk who kept the poll being absent, he recorded the *nine* last votes on Joseph Draper's poll taken on the first day, and *all* that were taken on the second and third days: that he also recorded all the votes that were offered for Charles C. Johnston during the same time; that he kept the said poll truly and faithfully; that he received all voters whom he believed legally qualified to vote," &c.

The sheriff  
cannot dis-  
pense with the  
appointment of  
a "*writer*," as  
required by  
law.

It appears that, of the votes thus recorded by the deputy sheriff in the absence of the clerk, there were, in the whole, for Mr. Draper 120 votes, and for Mr. Johnston 3 votes. The committee are of opinion that, by the laws of Virginia, the sheriff is not authorized to dispense with the writers or clerks contemplated, and that he cannot, singly and alone, lawfully exercise the double duty of judging of the qualifications of the electors, &c., and of recording their votes; and that the attendance of a clerk or "*writer*," acting under the obligation of his official oath, was intended as a salutary check upon the sheriff, which the committee do not feel at liberty to dispense with, and they are, therefore, of opinion

that all the votes thus taken, in the absence of the clerk, ought to be rejected.

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There are some other objections taken by the sitting member to other polls, which have been duly considered, but which they have not deemed necessary particularly to notice here, as no others have been allowed or considered tenable, and those which are here presented are sufficient to give the sitting member the majority. The committee, however, think proper to submit to the House a synopsis or brief statement of the principles settled by them, or by which they have been guided, as well in the admission or rejection of votes in particular cases, as upon the other points submitted.

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1st. That unmarried persons, who are living with their mothers, or with younger brothers and sisters, in the absence, or after the death of their father, taking charge of, and providing for the family, are to be deemed "housekeepers and heads of families," within the meaning of the constitution of Virginia, although such persons are unmarried.

Statement of  
points decided  
by the commit-  
tee.

2d. That where the voter keeps house, having a woman living with him as his wife, he is the "head of a family," within the meaning of the constitution, and that the committee will not inquire whether he is legally married or not.

3d. That persons possessed of a mere equitable interest in lands, or holding a bond for a deed, are not to be deemed "possessed of an estate of freehold in land," so as to entitle them to vote.

4th. The constitution gives the right to vote to those who, for twelve months, have been housekeepers and heads of families, "who shall have been assessed with a part of the revenue of the commonwealth within the preceding year, and actually paid the same." Under this provision a majority of the committee decided that where taxable property is owned and possessed by the son, and is assessed in the name of the father, but the tax is actually paid by the son, he, having all the other qualifications required, is entitled to vote; but that if the property is both assessed to, and paid by the father, the vote is to be rejected.

5th. That where a revenue tax is duly assessed, and the sheriff has paid the tax himself, and has not returned the party *delinquent*, as he has the right to do if he is insolvent, or the sheriff is not able to collect the tax, that this is to be deemed a payment by the party, so as to entitle him to a vote.

6th. That where the land of the elector, upon which he claims the right to vote, lies in a different county, or where the other required qualifications are in a different county from that in which the elector offers his vote, such vote ought to be rejected, the constitution giving the right only in the county "wherein such land shall lie, or such housekeeper and head of a family shall live."

7th. That where a voter is first polled, and his vote recorded for one candidate, he is not at liberty afterwards to



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Elections.

Points decided  
by the commit-  
tee.

change it,\* and have his vote transferred to another candidate ; nor, if he first votes for the State officers only, has he a right to come forward afterwards to vote for a Representative in Congress.

8th. That, by the laws of Virginia, the polls cannot be kept open more than three days inclusive.

9th. That the neglect to return the votes to the clerk's office within the required time after the canvass, the provisions being merely *directory*, will not vitiate the election, it appearing that the polls were afterwards returned and filed.

10th. That the assessment and payment of taxes required by the laws of Virginia, are to be for the year preceding the election, and not for the same year in which the election is held.

11th. That the neglect by the sheriff, or other officer conducting the election, to take the oath required by law, vitiates the poll for the particular precinct or county, and the whole votes of such precinct or county are to be rejected.

12th. That the legal presumption is, that the oath required has been taken, every officer being presumed to have done his duty, and that the *onus* is thrown upon the party taking the objection to show the neglect or omission ; but as the law of Virginia requires that the oath shall be duly returned by the magistrate before whom it is taken, and filed in the clerk's office, a certificate from the clerk that no such oath is filed, will be sufficient *prima facie* (notice of the objections being previously served upon the opposite party) to throw the burden of proof upon the party claiming the vote.

13th. That the sheriff, or other officer conducting the election, and particularly at the court-house, where no other superintendents are associated with him, must appoint one or more "writers" to take the polls ; and that the sheriff cannot act solely, and in the double capacity of superintendent and clerk ; and that the votes recorded by him, without the presence or aid of such clerk or writer, are to be rejected.†

15th. That the superintendents of a separate election, having been appointed by a court or other tribunal having the general appointing power for that purpose, which superintendents act as such, *colore officii*, no other person appearing or acting as conflicting claimants for the office, the committee will not inquire whether they were appointed at the particular term of the court contemplated by the act, or whether there was a "vacancy," within the meaning of the law.

The final canvass of the votes, upon the principles thus assumed by the committee, will be as follows :

\* See Washburn vs. Ripley, ante, p. 679.

† See the case of Porterfield vs. McCoy, ante, p. 267, where this exception, taken by the petitioner, was overruled by the committee. See, also, Easton vs. Scott, ante, p. 280, where it was held that the judges may act as clerks, unless prohibited by law.

Aggregate number of votes given in the district for Mr. Johnston . . . . .	2,749	1832. 22d CONGRESS, 1st SESSION.
Of this there were admitted to be <i>bad</i> , by the agreement of the parties . . . . .	307	Report of the Committee of Elections.
And of the stated cases, as to the qualifications of particular voters, the committee reject . . . . .	23	Final results stated by the committee.
They also reject all the votes polled on the 4th day . . . . .	86	
But of this number the committee had already rejected, upon the cases agreed, as by persons not qualified . . . . .	8	
	78	
Rejected for votes at separate elections in Wythe, at <i>Peter Gnaveley's</i> (deputy not sworn) . . . . .	19	
Rejected for votes recorded by deputy sheriff of Wythe, at court-house, in the absence of the clerk or writer . . . . .	3	
	430	
But of the number admitted in the first instance to be <i>bad</i> , proof is now furnished that 54 are good . . . . .	54	
	376	
Aggregate number of votes decided to be good . . . . .	2,373	
Do do do for Mr. Draper . . . . .	2,250	
Majority for Mr. Johnston . . . . .	123	

Aggregate number of votes given in the district for Mr. Draper . . . . .	2,671
Of this number there were admitted to be <i>bad</i> . . . . .	313
And of the stated cases, the committee reject, for votes by persons not qualified . . . . .	27
For votes taken at separate election in Wythe, at <i>Peter Gnaveley's</i> (deputy not sworn) . . . . .	43
For votes recorded by the deputy sheriff, at Wythe court-house, in the absence of clerk or "writer" . . . . .	120
	503
But of the number admitted to be <i>bad</i> in the first instance, proof is now furnished that 82 are good . . . . .	82
	421
Aggregate number of votes decided to be good . . . . .	2,250

[NOTE.—In the above statement, all the votes taken at Peter Gnaveley's and at Wythe court-house are rejected, and stricken from Mr. Draper's poll. There are supposed to be among the number the names of more or less voters who

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Elections.

Doubts ex-  
pressed as to  
the result.

have been previously deducted as given by persons not qualified. It is a work of considerable labor to go through the stipulations; and ascertain the number, which the committee have not done, as, under the principles assumed by them, it became unnecessary. It can be ascertained, however, from the papers before the committee, if a different decision by the House upon the points submitted should make such an examination necessary.]

It will be perceived that, from the erroneous principle assumed by the parties in the outset, disfranchising, by stipulation, upwards of 600 voters in a closely contested election, many of whom are now proved to have been duly qualified, and a majority of whom *may* have been; and, by reason of the technical objections upon which 185 votes have been rejected, exclusive of the votes polled on the fourth day in Washington county, giving the seat to either of the candidates might be doing injustice to the electors of the district, for it is impossible to determine which of the candidates did, in fact, receive a majority of the legal votes.

A *majority* of the committee have therefore come to the conclusion that it would be doing better justice to the parties, and to the electors of the district, to give them another opportunity of expressing their opinions upon the subject, by a new election.

A *minority* of the committee, while they are free to confess that, under the peculiar circumstances of this case, they would be not only reconciled to, but better satisfied with, such a result, if they could have felt themselves at liberty to unite in it, are, nevertheless, of opinion that the sitting member, having received a majority of the legal votes, upon the principles assumed, is entitled to the seat, and are, therefore, constrained to dissent from the resolution proposed by the majority.

The resolution agreed to be submitted to the House by a *majority* of the committee, is as follows:

Resolution for  
vacating the  
seat.

*Resolved*, That the seat of Charles C. Johnston, the sitting member from the congressional district, in Virginia, composed of the counties of Russell, Scott, Wythe, Lee, Tazewell, Grayson, and Washington, be vacated, for irregularities in the election; and that the Speaker of the House transmit to the Executive of Virginia a copy of this resolution, to the end that a new election may be ordered."

On the 26th of May, 1832, the foregoing report was considered in Committee of the Whole House. Mr. COLLIER moved to strike out the whole of the resolution reported by the Committee of Elections, after the word "*Resolved*," and insert the following, viz. "That Charles C. Johnston, the sitting member, is entitled to his seat."

Sitting mem-  
ber confirmed  
in his seat.

This amendment was, after much debate, adopted by the Committee of the Whole, and afterwards agreed to by the House, by a vote of 85 to 35, and Mr. Johnston was thereby confirmed in his seat.

## TWENTY-THIRD CONGRESS—FIRST SESSION.

### COMMITTEE OF ELECTIONS.

Mr. CLAIRBORNE, of Va.  
GRIFFIN,  
HAWKINS,  
BANKS,  
VANDERPOEL,

Mr. JONES, of Ga.  
PEYTON,  
HAMER,  
HANNESMAN.

### CASE LXI.

#### ROBERT P. LETCHER *vs.* THOMAS P. MOORE, of Kentucky.

[The law of Kentucky requires the certificate of election of a member to be made out and signed by the sheriffs of all the counties composing the district. In this case it was signed by *three* sheriffs out of five, and the returns of one county were entirely omitted.

QUEST. Whether this certificate was *prima facie* evidence in his favor, so as to entitle the person holding it to take the seat in the first instance.

In this case both candidates claimed the seat; Mr. Moore, by virtue of a certificate of election made by three sheriffs out of five, and on returns embracing four counties out of five, of which the district is composed, the poll book of one county being withheld by the sheriff. Mr. Letcher claimed it on the ground of an election by a majority of the votes of the entire district, as evidenced by the poll books of all the counties.

A majority of the Committee of Elections, on the evidence, and a scrutiny of the polls, rejected as illegal so large a number of the votes given to Mr. Letcher, as to leave to Mr. Moore a majority of 44, and they reported the latter as entitled to his seat.

A minority of the committee (Mr. GRIFFIN and Mr. BANKS) dissented from the opinions contained in their report, and presented their own views in a separate report. Both reports are spread before the reader. The House, however, did not adopt the course recommended by either; but, after many days' debate, terminated the case by the adoption of a resolution expressive of their inability to decide, from the evidence, which gentleman was entitled to the seat, and declaring it vacant.]

On the first day of the meeting of the twenty-third Congress, the House was, agreeably to usage, called to order by its acting Clerk, M. ST. CLAIR CLARKE, Esq., who proceeded to call the roll of the members by States, beginning with the State of Maine. Having proceeded as far as the State of Kentucky, before its members were called,

Mr. CHILTON ALLAN, of that State, rose, and asked permission to address the House. He observed that, by the law passed at the last Congress, apportioning the number of Representatives among the several States, the State of Kentucky had been declared entitled to *thirteen* Representatives. Debate on the validity of Mr. Moore's credentials to entitle him to take the seat.

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23d CONGRESS,  
1st Session.

Debate on the  
sufficiency of  
Mr. Moore's  
credentials.

in the present Congress; but that, in casting his eyes around the hall, he recognised *fourteen* gentlemen ostensibly claiming to be Representatives of the State, and members of this House. The State, he said, was divided by law into thirteen districts, from each of which one member was directed to be chosen to represent her interests in this body. From one of these districts, the fifth, consisting of the counties of Mercer, Garrard, Lincoln, Jessamine, and Anderson, there were two gentlemen present, both claiming a right to appear on this floor. From the circumstances of this case, it was obvious that the question of their right to a seat must be decided in the present stage of the proceedings. The question arising from these conflicting claims was one deeply interesting, not only to their own immediate districts, but to the State at large; so much so, that the delegates from the State had met together, and had deemed it their duty to take the novel case presented under their most serious consideration. They had, accordingly, examined the electoral law of Kentucky, and the returns from the district in question, and had concluded (very contrary to his own wishes) to appoint him as their organ to raise the question involved by the circumstances of these claims before that body.

He rose, as must be obvious, under circumstances peculiarly embarrassing, to address, at this early moment, a new Congress, with a majority of whose members he was personally unacquainted. But the duty was imposed upon him; and although, if left to consult his own feelings, he should much rather have occupied his seat, and given a silent vote, he did not feel at liberty to decline its performance. The duty was the more painful, because the question to be raised related to two individuals, with both of whom he was personally acquainted, and in habits of the most friendly intercourse. He could assure both the gentlemen, however, that he should endeavor to perform the unwelcome task assigned him in a manner the most respectful to their feelings.

In order to enable the House to decide the controversy between these claimants, he would ask the Clerk whether he had in his possession any certificates, or other vouchers, in relation to the late election in the district from which both the gentlemen came. And if he had, he would call upon the Clerk to read them.

The Clerk replied that there were in his possession divers papers on that subject, and, if it were the desire of the gentleman, they would be produced.

[Cries of "Read! read!" resounded from all parts of the hall.]

The papers were accordingly produced; but, before reading them, the Clerk stated that they would have been in his possession at an earlier period, but, owing to their being addressed to "the Speaker or Clerk of the House of Rep-

representatives," they had been placed in the box at the post office usually appropriated to the Speaker of the House: here they had remained until late the night before, when, there being no Speaker as yet, he had taken the liberty of opening the package, which was postmarked "Lexington," and which, he concluded, must probably refer to this matter.

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23d Congress,  
1st Session.  
Debate relative  
to the creden-  
tials of Mr.  
Moore.

The Clerk was now about to read the papers ; when

Mr. WAYNE, of Georgia, rose, and, after premising his wish that it should be clearly understood that he took no part in the controverted claim on either side, inquired of the Clerk whose name appeared on the roll which had been made out by him as elected from the district in question.

The Clerk replied that the name on the roll was that of Thomas P. Moore.

Mr. WAYNE then resumed, and expressed his wish that the individual whose name had been inserted on the roll, should produce and exhibit his credentials, that the House might be in circumstances of judging of the validity of his claim. From the earliest period of our congressional history, this had been the usage, and no new member was sworn in until his credentials had first been produced and examined. Of late, a different course had been pursued, probably to avoid delay ; but, in the present instance, there was an obvious propriety that the original usage should, in this case, be revived. Mr. W. said that with one of the claimants he had no personal acquaintance, with the other he had, and cherished much regard for him, and he did not wish that his rights should be compromised on this occasion. He felt his present course to be a solemn duty—it sprang from his heart ; he was imperatively bound to stop, if possible, a course of proceedings by which the right of any member claiming a seat on that floor might be contested in the most irregular manner. As yet, he believed a majority of the names on the roll had not been called, and until that had been done, and gentlemen had answered, although he saw them on the floor and in those seats, he could not recognise them as members of the House of Representatives, nor, indeed, could he do so after they had answered, until they had been sworn into office as prescribed by the constitution. He submitted it to the judgment of gentlemen present, whether the old mode of calling for the credentials of claiming members was not the fit mode of settling this affair.

Mr. ALLAN inquired whether he was to understand the gentleman from Georgia as objecting to the reading of the paper in the hands of the Clerk.

Mr. WAYNE answered in the negative ; but said that he wished the credentials of the gentleman entered on the roll should first be produced.

Mr. ALLAN replied that the paper about to be read was precisely the document which the gentleman from Georgia wanted to be read.



1833.  
26d Congress,  
1st Session.

Debate as to  
the right of ei-  
ther party to  
be sworn in.

The Clerk then proceeded to read, first, the envelope which contained the election returns of twelve out of the thirteen districts in Kentucky, (the sixth district not being included; for what reason, he was ignorant.) The return from the fifth district (the district now in question) was included, and he would now proceed to read it.

Mr. WAYNE inquired whether it had been presented by the gentleman whose name was on the roll, as his credentials.

The Clerk replied that he had received no paper of any kind from Mr. Moore.

The Clerk then read the certificate of the Governor of Kentucky accompanying the returns.

Mr. ALLAN called for the reading of the certificate from the sheriffs of the fifth congressional district.

Mr. WAYNE objected to its being read.

Mr. ALLAN then inquired whether the gentleman from Georgia meant to be understood as maintaining the position, that, because any individual had been enrolled by the Clerk as a member of the present Congress, that individual was, on that account, entitled to be sworn in as a sitting member.

Mr. WAYNE said that the person claiming to be substituted for the individual upon the roll ought to produce his credentials, and say whether those were the papers on which he intended to found his claim to a seat. If that were done, Mr. W. would be ready to pass upon them.

Mr. MOORE, of Kentucky, said that, had he not been informed from various quarters that this movement would be made, it would have greatly surprised him. Unprecedented as it is, he was prepared to meet it calmly, and to submit it to the decision of the House, though uninformed, and not having the power to give a legal decision, as is now the case. It is upon *prima facie* evidence only, said Mr. M., that any member of this House is entitled to be sworn, and it cannot be known to us, as a constitutional body, whose election is to be contested, and whose not, until the House is organized. Until then, there is, in fact, no one entitled to make such a motion, and no one entitled to decide it. I come here with the *prima facie* evidence of my election, like the honorable gentlemen around me. I have in my possession the certificate of a majority of the sheriffs convened, according to law, to compare the polls; and the Clerk of this House has received the same evidence from the Governor of the State of Kentucky, that I am the Representative of the fifth congressional district, that he has transmitted to establish the claim of the other members from Kentucky. If these documents are informal or defective, a committee of this House, after it is duly organized, will so decide, and until they do so decide, and it is sanctioned by this House, I am as much entitled to my seat as any member on this floor.

I not only have the *prima facie* evidence of my right to the

seat, but if any one, at a proper period, shall come forward to contest it, I shall, I hope, be prepared to show that I am duly elected, or that the election was marked by such gross irregularities as ought to induce this House to refer it again to the decision of the people. Nothing but a deep conviction of the truth of what I have stated would have brought me here ; and, if my wishes could have controlled, all doubts as to who is legally entitled to the seat would have been decided by the people themselves, without troubling this House. But as that appeal to decide ultimate as well as *prima facie* rights was declined, I am left no alternative but to assert my rights, and those of the people whom I claim to represent here.

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1st Session.  
Debate continued.

Ever inclined to pursue that course which will preserve order and decorum in this hall, and not being disposed to retard the organization of the House, I shall cheerfully submit to any decision the gentlemen present shall make ; but it is my duty to do it with a proper reservation of my rights, and the rights of those who sent me here.

I therefore respectfully deny the right of any one at *this time* to vote on the subject, and if I am prohibited from qualifying, I shall protest against it as an arbitrary exercise of power, which will form a most dangerous precedent, and not only deprive me of my just rights, but the people of the fifth congressional district of their Representative.

The reading of the papers then proceeded, and the election return from the fifth district of Kentucky was read ; at the close of which the words "the votes of Lincoln county not being taken into the account," occurring,

Mr. MARSHALL inquired whether those words preceded the signatures.

The Clerk, as the reporter understood him, replied in the affirmative.

Mr. Moore then inquired whether those words were not in a different handwriting from the body of the certificate.

This also was answered by the Clerk in the affirmative.

Mr. ALLAN inquired (turning to Mr. Moore) whether it was intended to contend that that part of the paper was a forgery.

Mr. Moore explained ; but all the reporter could catch was that Mr. M. had been told that the words had been inserted at the instance of one of the sheriffs, after the signing ; but he disclaimed any intention to impute forgery.

Mr. ALLAN then proceeded. He now understood that the paper which had been read was the document by virtue of which the gentleman who had just taken his seat claimed to be duly elected to the present Congress ; and he admitted that if that paper, according to the laws of Kentucky, had been certified and signed by the persons required to certify and sign it, then, by the usages of that House, the gentleman was entitled for the present to be recognised as the sitting

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23d CONGRESS,  
1st Session.

Debate conti-  
nued.

member. But if the paper was not, in point of fact, a certificate of the electoral vote of the fifth congressional district of Kentucky, and was not signed by those persons required by law to sign it, then it was a nullity; and it turned out that the individual was claiming a seat on that floor without any certificate of his election. The delegation from Kentucky had compared this paper with the laws of that State, and had come to the conclusion that the certificate was null and void; and he would briefly submit to the House the reasons of such conclusion.

The paper professed to certify the vote of a district composed of five counties. By the State law, it was the duty of the sheriffs of these five counties to meet together on a certain day after the polls were closed, to compare the votes given in their several counties, add them up, and give a certificate of the result, *signed by all of them*. The object of the law certainly was to ascertain who had a majority of all the votes given in, and to furnish such individual with a legal certificate of his election. [Mr. A. here quoted the law.]

Mr. WAYNE made some inquiry of Mr. ALLAN; but his back being turned towards the reporter, not one word of what he said could be distinctly heard.

Mr. ALLAN, in reply, said that he understood himself to possess the right of rising, and presenting the question in this case to the House. This was a House. Under the view of the constitution, it was competent to perform any act pertaining to the House of Representatives, and its first duty was to ascertain who were its own members. This was a representative Government, and the first question which demanded attention was, whether individuals claiming to be representatives of the people, were actually their representatives.

Mr. FOSTER, of Georgia, having, by permission of Mr. ALLAN, taken the floor, proposed the appointment of a chairman to give order to the proceedings.

A member inquired whether a quorum of the House had answered to their names.

Mr. FOSTER further urged the expediency of choosing a chairman. The House was competent to do this, whether a quorum had answered or no; just as a number of gentlemen, met for any other business, were accustomed to do.

Mr. ELLSWORTH thought it would be better to let the Clerk proceed as usual. Till the roll was gone through with, they could not tell who was entitled to vote for a chairman.

Mr. FOSTER said the Clerk did not act as chairman, he only read a list he had made out; on what ground, or by what authority, Mr. F. did not know; surely his placing the name of a particular person on that list did not make him a member of the House of Representatives.

Mr. SPENCER thought it would be much better to postpone

this matter until the roll had been gone through, the members qualified, and the Speaker chosen. A debate previous to that would only produce confusion.

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Mr. ALLAN replied, that if it were the custom of the House to qualify the members before the Speaker was elected, and the gentlemen from Kentucky would acquiesce, he should be more willing to comply with this suggestion; but the usual course had been to elect a Speaker first, and qualify the members afterwards. It was known to every man, of the least observation or experience, that the election of the Speaker gave a character to the House and a tone to all its proceedings; and he asked whether his State was not entitled to have her full and just representation upon that floor when an act so important was about to be done. Surely she had a right to demand the decision of a question of such consequence—a question which went directly to that vital interest of freemen, the right of suffrage. He admitted that the question was of a novel and somewhat embarrassing character, and required to be treated with consideration; but there was abundant time for its examination. How could the time of the House be occupied more profitably than in putting a question of this magnitude to rest? There was no necessity to hurry a decision. Believing it to be conceded that he had a right to the floor, he should now proceed, respectfully and very briefly, to state the two fatal objections which existed to the legality of the paper which had been read at the Clerk's table. They were on the face of the paper itself. He should not go behind it.

Debate on the  
claim of Mr. M.  
to be sworn in.

Here Mr. BOON requested Mr. ALLAN to yield the floor to him for a moment; but Mr. A. refused, and was about proceeding to explain his objections to the sheriffs' certificate, when [having been spoken to aside by Mr. CHILTON] he said that he understood a proposition would be made by one of the gentlemen claiming the seat; and with a view to afford an opportunity for such a movement, he would readily take his seat.

Mr. Letcher, of Kentucky, then proposed to Mr. Moore that they should both withdraw until after the election for Speaker had taken place.

Mr. Moore was understood as acquiescing in this proposal: whereupon,

The Clerk proceeded to call the residue of the roll; when it appeared that 229 members were present.

The House proceeded to the election of a Speaker, and then adjourned.

DECEMBER 4, 1833.

The following copy of the sheriffs' certificate having been read, under which the Hon. T. P. Moore claims to be qualified as a member of the House:

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23d CONGRESS,  
1st Session.

Debate continued.

Mr. Moore's  
certificate of  
election.

STATE OF KENTUCKY, *Fifth Congressional District*:

We, the undersigned, sheriffs for the counties of Mercer, Garrard, Anderson, Lincoln, and Jessamine, composing said fifth congressional district, do certify that on the fifteenth day after the commencement of the late congressional election for said district, to wit, on the 20th day of August, 1833, we met at the court-house in Harrodsburg, Mercer county, and, adjourning from day to day, made a faithful comparison and addition of the votes and polls for said congressional election for said district, and found and accordingly certify that Thomas P. Moore is duly elected Representative to Congress from the said fifth congressional district, by a majority of the qualified votes of said district.

Given under our hands this 21st day of August, 1833. The vote of Lincoln county not taken into calculation.

JACOB KELLER,

*Deputy for G. W. Thompson, S. M. C.*

R. WALKER,

*Deputy for John Wash, S. A. C.*

JAMES H. LOWRY,

*Deputy for John Downing, S. J. C.*

And the following clause of the law of Kentucky having also been read by Mr. ALLAN on Monday, in objecting to Mr. Moore's claim:

*An act to divide the State into congressional districts, approved February 2, 1833:*

Election law of  
Kentucky.

"SEC. 3. *Be it further enacted*, That the sheriffs of the several counties in each district shall, on the fifteenth day after the commencement of their elections, assemble at the places hereinafter designated, in each of their respective districts, and there, by faithful comparison and addition, ascertain the person elected in their districts."

"SEC. 5. *Be it further enacted*, \* \* \* \* \*  
After having ascertained, as before directed, the person elected in such district, the sheriffs thereof shall make out a certificate of the election of the person in their district, which shall be signed by all the sheriffs of the district, and which shall be lodged with the sheriff of the county wherein the polls are compared, and by him, together with a copy of the polls, transmitted to the Secretary of State."

Mr. ALLAN said the remarks which he was submitting to the House on Monday, had been suspended by the voluntary withdrawal of the two gentlemen claiming the seat. He would now briefly conclude what he had to say in presenting this subject to the consideration of the House. We have now before us the certificate under which Mr. Moore claims a seat, and also the law of Kentucky, from which the merits of this controversy may be easily comprehended.

It is likely, from the skirmish we had the other day, that there exists a mistake as to the character of this certificate. Mr. A. saw, by the printed reports of the debate on Monday, that Mr. Moore stated in his speech that "the Clerk of this House has received the same evidence from the Governor of the State of Kentucky, that I am the Representative of the fifth congressional district, that he has transmitted to establish the claim of the other members from Kentucky."

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Debate on the  
prior right of  
the parties to  
the seat.

Mr. A. said that he understood, from this statement, that the impression had been made that the Governor of Kentucky was (like the Governors of several other States) authorized to give certificates of election to members of Congress, and that he had, in this case, actually given such certificate. It is proper that any misapprehension on the subject should be corrected. There is no law in Kentucky that requires the Governor to certify who is elected to Congress; in this case the Governor has not undertaken to give any such certificate. He has fully discharged his duty in transmitting to this House the original certificates of the sheriffs of the several congressional districts, which were filed in the office of the Secretary of State, and this is all the Governor has done in relation to the certificate in question.

No one can pretend that the meaning of this certificate has been changed, or that any new weight or additional authority has been communicated to this paper by the mere fact that it was taken out of the Secretary's office, and sent here by the Governor. So the right of the gentleman who claims under this certificate, if right he has, must be sought for upon the face of the paper itself, and not in any surmise that the Governor of Kentucky has furnished any other evidence. But, sir, this certificate does not contain the same evidence of the election of the gentleman who offers it as is contained in the certificates transmitted here by the Governor to establish the claim of the other members from Kentucky.

Remarks of  
Mr. Allan of  
Kentucky.

There is this essential difference between the certificate in question, and those held by all the other gentlemen from Kentucky. This certificate states that the vote of one of the five counties of the district was not taken into the calculation when the polls were compared, and it is only signed by three of the five sheriffs. Each of the certificates from the other districts in Kentucky is signed by all the sheriffs of the districts respectively. Now, sir, the question is, whether this certificate is *prima facie* evidence of the election of Mr. Moore. There is upon the face of the certificate two defects, either of which would render it a nullity. The fact is certified that the vote of Lincoln was not counted. The sheriffs being mere ministerial officers, had no power to reject a single vote. The law made it their duty to count the votes of the whole district, for the purpose of ascertaining who had a majority. Will any one contend that this law



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Debate continued.

Remarks of  
Mr. Allan, of  
Kentucky.

is complied with by a certificate that states that a part only of the votes of the district were counted? The right to elect a member to Congress is in a majority of the voters of the whole district. A certificate showing for whom a majority of a part of the district voted does not prove how a majority of the whole voted.

But again: To make a certificate valid, the law positively requires that it should be signed by all of the sheriffs of the district. This certificate has the signature of but three out of the five sheriffs; in this case, one sheriff cannot act for another; nor can a majority of them act for the whole. They do not represent the same interest; each one acts for a separate community; each one had in his possession the official evidence of the vote of his county; each one was the organ by which this official evidence should be conveyed to the rest. The law, therefore, required the action of the whole of the sheriffs of the district in the first place, to ascertain who had a majority of the votes of the whole district; and, in the second place, required the signatures of them all to authenticate the certificate of election.

It is therefore manifest that the certificate under which Mr. Moore claims his seat is a mere nullity.

It appears from this certificate that all the sheriffs met at Harrodsburg on the fifteenth day after the election, the time and place appointed by law for them to convene. It is difficult to imagine how they could so far mistake their duty. The result of the election in every county was then a matter of public notoriety: the election of Mr. Letcher was announced in the newspapers; the sheriffs had their poll books before them, that showed at once that he had a majority of the whole district.

They met on the 20th of August, and adjourned until the next day. Whence this delay? To add up the polls and give the certificate was not the work of an hour, yet it appears from the certificate that the subject was under consideration two days.

It appears that a part of the sheriffs were not willing to abide by the voice of a majority of the district; and to control the majority, it seems the sheriff of Lincoln marched off with his poll book, and, in his absence, three of the sheriffs have undertaken to say who should represent that district.

In Lincoln county Mr. Letcher had a majority of 149 votes.

If this certificate should prevail, the people of Lincoln (which is one of the oldest and most highly improved counties in Kentucky) need not be at the trouble of going to the polls at the next election, they can send their sheriff to say whether they shall be allowed to vote or not.

In good old times, in Kentucky, said Mr. ALLAN, a certain candidate who had been beaten at an election, was asked the reason of his defeat. "Nothing but the want of

a sufficient number of votes," was the reply. In those times of simplicity this was thought to be a very good reason; indeed, the idea of getting into Congress without a majority of votes had not then entered into the mind of any one. But, said Mr. A., if the precedent which a decision of this case in favor of the gentleman whose name is returned (Mr. Moore) be once established, there will in future be a way of coming to Congress independent of the will of the people.

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Debate continued.

The poll books from all the counties in the district, regularly certified according to all the requirements of the law, were now on the Clerk's table, from which it appeared that Mr. Letcher had a clear majority of all the votes given in the district. If the gentleman now offering to be qualified should, for the present, succeed as the sitting member, and should finally lose the seat, the Treasury would be charged with the mileage and per diem of both the claimants until the final decision of the controversy. Mr. A. said he did not present this as a very prominent consideration; but still it was one that had a bearing on the case, and ought not to be entirely unattended to.

Mr. ALLAN concluded by observing that he had endeavored to do his duty in bringing before the House this most singular occurrence. He had presented the law and the facts of the case. It now remained with the Representatives of the people of the United States assembled here in the House of the people, to decide whether they will give their sanction to a proceeding by which the arbitrary will of the deputy sheriffs shall be substituted for the vote of a whole district—a proceeding destructive to the rights and liberties of the people of the fifth congressional district, injurious to the interests of the State of Kentucky, and which may, as a precedent, affect the right of suffrage in every part of the Union.

Mr. HAWES, of Kentucky, would not undertake to contradict what his colleague had stated as the facts of the case, but contended that these facts, according to his own showing, proved that the ancient method of admitting members to a seat ought to be resumed. He admitted that the certificate of the sheriffs was informal and defective, yet he insisted that it ought to be received, in the present stage of proceedings, as *prima facie* evidence of Mr. Moore's claim, and that he ought thereon to be received as the sitting member until further investigation. It did not appear from the face of the certificate that if the votes of Lincoln county had been included, Mr. Letcher would have had a majority of the votes in the district. The omission of one of the sheriffs to certify, was a case not provided for by the laws of Kentucky. A similar omission in the election of Governor, however, was provided for; and there the majority of the sheriffs were competent, after waiting for a prescribed period, to make a return which should be valid in law. In case of congressional elections, the law assigned a punishment for

Mr. H. contends that the certificate of Mr. Moore is *prima facie* evidence of his right to the seat.

1833. the delinquent sheriffs, yet their failure ought not to deprive  
 23d Congress, a man of his seat under such certificate as might be furnished  
 1st Session. him. Mr. H. professed entire impartiality, and only desired  
 Debate on the that justice might be done between the parties.

sufficiency of Mr. CHILTON, of Kentucky, followed on the opposite side.  
 the credentials He thought that his colleague's admission of the accuracy of  
 produced by the statement of the facts of this case was fatal to his whole  
 Mr. Moore. argument; for, if the facts were as had been stated by his  
 colleague first up, what need could there be of any committee  
 to judge of them? The sole question in the case was, whether  
 the certificate which had been produced was or was not of  
 a legal character. The duty of the sheriffs was plainly pointed  
 out by the law, and all that was to be decided was whether  
 they had complied with it or not. He then reviewed the  
 certificate, and insisted that it was palpable that they had not.  
 Nor could he admit, as had been concluded, that though the  
 evidence furnished by such a paper might be incomplete,  
 yet it was the next best that could be obtained in the case,  
 and therefore ought to be received. Would it be admitted  
 in a court of justice, in a case where there were two wit-  
 nesses to a fact, one of them competent, credible, and disin-  
 terested, and the other of an opposite character, that, if the  
 first could not be obtained, the testimony of the interested  
 witness must be admitted, because it was the next best?  
 Surely not.

Mr. C. dwelt upon the dangerous consequences that must  
 grow out of the reception of such a paper to the purity of  
 elections, and the safety of the elective franchise. If the  
 nullity of the certificate had not been upon its face, then the  
 case ought doubtless to take the usual course, and go to a  
 committee; but the defect was palpable, open to all, plain  
 at first sight.

Mr. LANE, of Indiana, contended that the question before  
 the House was not who had or had not received a majority  
 of the votes given; but who had produced the best *prima*  
*facie* evidence of his right to a seat. Now, he had yet to  
 learn that Mr. Letcher had produced any certificate of any  
 kind. It was a principle of law, that in cases where acts  
 had been performed by persons legally appointed to perform  
 them, it was to be presumed that those acts were rightly done  
 until the contrary should be shown. Now, there might have  
 been good reasons why the votes of Lincoln county had not  
 been included in the certificate; no election might have been  
 held in that county, or no returns received from it. It had  
 been contended by one gentleman (Mr. ALLAN) that a mem-  
 ber was not to be admitted to a seat without papers perfect  
 in all respects; but had Mr. Letcher such papers? If not,  
 how then would the gentleman receive him?

Mr. MARSHALL, of Kentucky, denied that the question  
 was, as yet, which of the claimants had produced the best  
*prima facie* evidence; Mr. Letcher's evidence had not yet

come up at all ; the question was, whether Mr. Moore had furnished such as would enable the House safely and properly to admit him to his seat.

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Mr. M. then went into an examination of the certificate on which Mr. Moore claimed, and insisted that no court of justice in the country would receive it as evidence under the law of Kentucky. The paper did not contain evidence of the main fact in the case, viz. what was the choice of the people of the district in question ? This was what the House wanted, and this could be obtained from the legal record, the poll books ; certified copies of all which were now on the Clerk's table. The certificate was only a substitute for these, admitted out of convenience ; but if it was defective, then resort must be had to the records themselves, which were the very best possible evidence in the case. As to the provision referred to by his colleague, (Mr. HAWES,) in case of the election of Governor, it only went to strengthen his argument. The Legislature were willing in that case to take less than the certificates of the whole number of sheriffs ; but in case of a congressional election, it insisted that *every* sheriff should certify. Instead of Mr. Letcher's having no evidence, he had the certificate of every officer holding a poll throughout the State. Mr. M. contended that this case was new, and that the precedent referred to by Mr. HAWES did not apply.

Debate in regard to the credentials of the parties.

Mr. ELLSWORTH presumed that, if either of the claimants could satisfy the House what had been the actual state of the ballot box, the House would be governed by that fact, and decide accordingly. This was not one of those cases where a majority of the sheriffs could act for the whole. Had they certified that A B had been elected according to the votes of *one* county, could that be deemed sufficient ? Surely not. Suppose they had certified the same according to *two* counties, would that be admitted ? or of *three* ? why then of *four*, when *five* counties had voted ? Would a certificate be admitted that a certain paper was the record of a court, *except one page* ? This was just such a certificate.

Mr. BEARDSLEY maintained that the question was to be settled solely on the face of the certificate. Now, though the certificate stated that the Lincoln returns were not included, it did not say that any votes had been given in Lincoln, or that, if they had, they would have given a majority to Mr. Letcher. And though the number of sheriffs certifying was less than the whole, yet the principle of law applied was, that in all public bodies the act of a majority was the act of the body. Had one of the sheriffs died before certifying, would that have destroyed the certificate ?

Mr. POLK rose for the purpose of calling the attention of the House to some precedents which he had discovered since the question was brought on the other day. He found that questions of a similar description had been decided by that

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sufficiency of  
the credentials  
produced to  
entitle either  
party to take  
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House, in several cases where contested elections had been brought before it.

Mr. P. then referred to a case which occurred in the twentieth congressional district of the State of New York. The law of that State provided for the appointment of what were denominated State canvassers, whose duty it was to render to the Secretary of the State the returns of the elections as received by them. The case he adverted to was the contested election between Mr. Hugunin and Mr. Ten Eyck, for the election district composed of the counties of Oswego, Jefferson, Lewis, and St. Lawrence, which formed a double district, and, therefore, returned two members. Mr. Hugunin was designated, in some of the votes given in, as Daniel Hugunin, jr.; and, in others, as Daniel Hugunin, alone. The union of the votes bearing Mr. Hugunin's name upon that gentleman would have secured his election; but the return was made, after affidavit had been made in the case, in favor of Mr. Ten Eyck. Mr. Ten Eyck came to the seat of Congress with a certificate of election. It was known that there were disputed votes on the occasion of this election, and yet Mr. Ten Eyck was permitted to take his seat. Suppose Mr. Hugunin had appeared, and claimed the seat, on the ground that the word junior was omitted in some of the votes understood to be given to, or intended for him. Suppose he had objected to the competency of the member returned taking his seat, as was the case now, on the alleged ground of the omission of the poll of Lincoln county. What would be the case in the present instance? Mr. Hugunin's case, as competing with Mr. Ten Eyck for the seat, was not entered into, was not regarded by the House, in its preliminary stage. The House could not and did not go beyond the certificate of election which had been forwarded from the returning officer. Mr. Ten Eyck took his seat; and, subsequently, the Committee of Elections decided that the latter was duly elected, and of course entitled to the seat.

Mr. P. next cited another case, that of the contested election which grew out of the New York congressional election, commencing on the first Monday of November, 1828, and the parties to which were Mr. Silas Wright, jr. and Mr. George Fisher. The vote on that occasion, as returned, was for

Mr. G. Fisher, ; . . . . . 8,939

Mr. S. Wright, . . . . . 8,932

In this case, also, from the omission of the proper authorities of the congressional district, several votes which were given in without the word junior were not counted, and Mr. Fisher was allowed to take the seat, and retain it until the question had been decided upon by the Committee of Elections, and the seat was finally given to Mr. Silas Wright.

Mr. P. next reviewed a case of a somewhat similar nature, which was that of Messrs. Wing and Biddle, who con-



tested a few years since the seat of the Delegate from the Territory of Michigan. Mr. Wing was returned as having received 734 votes, and Mr. Biddle 731, and the territorial canvassers had decided accordingly that Mr. Wing was elected. Here Mr. P. read a statement from the report of the committee on the subject, and observed that although the canvassing committee had exceeded their authority, their conduct did not affect the right of the parties claiming the seat. Neither, therefore, could the conduct of others in the present case affect the right of the claimant, or violate the certificate by virtue of which he claimed the seat. Let them, then, in the course which they had to pursue, not go beyond the certificate, but go to the proof of the case in the manner and according to the form established by former precedents. There were, he had no doubt, many more such precedents than those he had cited, which, perhaps, other gentlemen would bring under their consideration. He wished to understand, also, from those better conversant than himself with the laws of Kentucky on this subject, their particular bearing on the question.

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Mr. WARDWELL, of New York, said that one of the precedents referred to by the gentleman from Tennessee, (Mr. POLK,) had application to the district which he had the honor to represent in the last Congress, and part of which he now represented; he alluded to the case of Mr. Silas Wright, jr. and Mr. George Fisher. Mr. W. said, in the course of a detailed statement on this subject, that the vote of Boylston for Mr. Wright, which gave him a majority of 40, was omitted to be counted; if it had, he would have received the certificate of election, as the certificate given to Mr. Fisher was founded only on a majority of six votes. Mr. Fisher came on contrary to the wishes of his own friends, and retained the seat for two months, when Mr. S. Wright, jr. was declared the duly elected member. Mr. W. contended, from these precedents, that the present case ought to be decided by the Committee of Elections.

Mr. BURGESS rose, and said that though he was loath to trouble the House on the present occasion, yet he thought the gentlemen, in their anxiety to throw this subject into a Committee of Elections, might be rather too rapid in their course. It should first be ascertained that there was sufficient cause for doing so. Mr. B. said that, with a view to learn the sentiments of those who were more immediately interested in the decision of the question, they should approximate to the truth of the case as nearly as possible, and not send the matter to the election committee, before they should have decided what testimony was proper to be received, and after its reception sent to the committee. Mr. B. commented also on the anomaly which the certificate presented in the circumstance of three sheriffs testifying to the vote of four counties. The House ought to go behind that



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paper, and approach to the people, to the poll books, to ascertain whether A, B, C, and D, citizens of the United States, *did* vote or not, and then to leave the question of their right to vote, and for whom they might have voted, to the election committee. This will be our course, said Mr. B., if we regard the rights of the people; otherwise we shall present to the community the astounding spectacle of deciding on the election of one of two gentlemen, without deciding on the right of their and our fellow-citizens to vote for them. A gentleman from New York had stated very justly that three formed a majority of five; but he had yet to learn that the sheriffs had a right to assume in their own persons the expression of the opinion of four counties.

Mr. BURGESS repeated that in their decision the House were bound to approximate as closely as possible to the people, in order to the better understanding of the public will. Both of the gentlemen who were competing for the seat had been honored by the suffrages of their fellow-citizens; and let the House then, in deciding upon the question, be in full possession of every information which related to, or can bear upon it. Without minute and detailed returns, how could the House act in a proper manner upon it?

Mr. POLK should regret to be instrumental in any degree in unnecessarily occupying the time of the House. He had understood that the agents of each of the parties had been collecting testimony and preparing papers, to be submitted to the House, which would occupy their attention day by day. When he had objected to the reading of the papers, it was under the impression that the whole merits of the case would be open to discussion in this early stage of it. If he understood the question rightly, it appeared to him to be, which of the gentlemen should take the seat, with the understanding that the final decision of the right to it should be left to the Committee of Elections. As he wished not to engage the time of the House, he should withdraw all objections to the reading of the papers.

Mr. ALLAN was surprised that it should be said Mr. Letcher had produced no certificates. They had been on the Clerk's table since the opening of the session, and they would show the following result of the district election:

Statement of votes given at the polls.		For Letcher.		Moore:	
	Jessamine county,	581		489	
	Garrard do.	1,075		248	
	Anderson do.	199		436	
	Mercer do.	686		1,469	
	Lincoln do.	650		501	
		<hr/>		<hr/>	
		3,191		3,143	

giving Mr. Letcher a difference of 48 in his favor. Mr. A. then called for the reading of the returns from the judges of election in each county.

Mr. BURGESS objected to the certificate, because on its face it was evident the sheriffs had certified to what they could not know. Four sheriffs had certified the result of the election in five counties. They might as well certify the number of prisoners in the jail of an adjoining county. Each sheriff could only legally certify for his own county.

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Mr. POLK withdrew his objection to the reading.

But, before the reading was resumed, the House adjourned.

#### DECEMBER 5.

Mr. HARDIN, of Kentucky, said he thought, from what he had heard on the preceding day, that many gentlemen had felt embarrassed, owing to the question not being before the House in a tangible form. He would offer two resolutions, the object of which was to obviate this difficulty.

Remarks of Mr.  
Hardin, of Ky.

The resolutions were then read.

Mr. HARDIN resumed. He rose for the purpose of referring to the laws of the State of Kentucky with regard to elections. He discovered yesterday that many gentlemen were desirous of further information on this point; he would, therefore, enter a little more in detail into that subject, hoping, as he did, that he might be able to state briefly, yet clearly and distinctly, what were the laws of that State governing elections. It would be recollected that the constitution of the United States, after prescribing the qualification of members, contained the following provision: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." But Congress had not legislated for Kentucky on this subject; and, therefore, whatever might be the laws and rules of the Territory of Michigan, the Territory of Arkansas, or the State of New York, as to elections, they had nothing to do with the laws and rules of Kentucky as to this subject, nor could they enter into the question before them. The decision on that question must be governed solely by the laws of Kentucky, just as questions on its land titles, &c. were governed. If gentlemen would turn to the laws of Kentucky, they would find that that State was laid off, like other States, into counties. It had its county courts, its circuit courts, its courts of appeal, &c. By an act of its Legislature, it was made an indispensable duty of the county courts to appoint a time and place for the election of members of the Legislature every year, and members of Congress every other year.

[Mr. H. here went into an explanation of the rules of election pursued in the State of Kentucky, and read several extracts from the laws of that State on the subject.]

He would call the attention of the House to one point.

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Remarks of Mr.  
Hardin, of Ky.

He had read to them the act under which each gentleman claimed his seat on that floor. Now, what were the facts of the case? There were five counties forming the fifth congressional district; polls were opened in these five counties, not only for the election of members of the State Legislature, but also for members of Congress. They continued open for three successive days. On the fifteenth day from the day on which the polls were opened, the sheriffs of the five counties, either by themselves or their deputies, assembled at Harrodsburg, according to law. When assembled, for it appeared from the certificate that they *did* assemble, a certificate was made by the sheriffs of the counties of Jessamine, Anderson, and Mercer, that T. P. Moore was elected a Representative in Congress from the fifth congressional district of the State of Kentucky. But did the sheriff of Garrard county certify this? No. And yet he was present. But three sheriffs certified for five counties, and no sheriff could certify for more than his own county. He would ask gentlemen how they knew what portion of the qualified electors of the fifth district these three counties contained. He could select an instance, in which one county contained one-half the district. He estimated that about four-sevenths only of the qualified electors had voted. A gentleman had said yesterday that it did not appear on the face of the certificate that the county of Lincoln had given any votes. This was said upon the principle of special pleading; but they were not assembled there as special pleaders, but as legislators for a mighty nation. The question was this: was the signature of the certificate by three sheriffs sufficient?

After some further remarks on the subject of the signature of the Governor of the State to the certificate, Mr. HARDIN continued by contending that they must have one preliminary question settled in the House before they could properly proceed with the subject before them. Where was the evidence from the States of the validity of the election? They must have the credentials of the gentleman claiming the seat, in conformity with the laws of the State from which he came. The law of Kentucky provided, substantially, that the returns should be made from all the counties of a district, and that those returns should be certified by all the sheriffs of such counties. But gentlemen might say, suppose all the sheriffs should not attend at the place of the appointed meeting. If they should, he would take the freedom of supposing another case. Suppose all the sheriffs of the district should actually attend with their poll books, and that one of these sheriffs should happen to be a friend of the defeated candidate; and suppose, furthermore, that this said sheriff should put his poll book under his arm, and refuse to have the votes which it contained scrutinized and recorded. What was the inference in such

a case? And in presenting that case to them, he begged to be understood as not ascribing any agency in the matter to the claimant of the seat, (Mr. Moore.) The character and standing of that gentleman alike forbade the supposition. But, apart from all personal considerations, the question must be decided on its intrinsic and apparent merits. A majority of forty-eight votes appeared, for Mr. Letcher; and one of the sheriffs withholds his poll book, and says to his brother officer, you shall not count my votes. This was the case. The vote of Lincoln county was withheld, not because the sheriff had died on the road to Harrodsburg—not that he was incapable of attending—not that he did not attend—but, as was shown on the face of the certificate, because he would not permit the votes to be counted.

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What! Mr. HARDIN asked, would they permit a gentleman to qualify, when it was manifest that he appeared before them in a minority of forty-eight? Would they permit him to qualify because he had received the certificate of three sheriffs out of five? No. If they did so, it was because they would not count the vote of Lincoln county, and would meet the objection to his taking the seat by saying that three sheriffs say he was elected in four counties out of five. Not that he was elected by a majority of all the votes; for, if that were pretended, it might wear a plausible color of propriety. But no, he repeated, it could only be that three sheriffs had certified to the vote of four counties.

Suppose again, said Mr. H., that, in a congressional district composed of ten counties, two sheriffs should certify for A; two for B, and so on. Would the House permit either, or which, or all of the claimants to take seats as members duly returned? No, assuredly not; and it was, therefore, that he did not wish either Mr. Moore or Mr. Letcher to be declared elected until the matter should have undergone an investigation before the election committee. Whether that committee should call for the production of the original poll books, or require other evidence in order to arrive at a proper conclusion, it was not for him to say; but still he thought it nothing but fair that both the gentlemen should wait until it should be ascertained which of them was justly entitled to the contested seat. Besides, he might ask, in another point of view, what would be the relative situation of the claimants in the event of one of them being allowed to qualify for the seat? Suppose, for instance, Mr. Moore was permitted to assume it, and Mr. Letcher would have to wait, say until the month of May, when the Committee of Elections might decide in favor of the validity of his election. The gentleman occupying the seat in the interim would have stood on high vantage ground; he would have been drawing his *per diem* allowance, whilst the other, who might afterwards be declared the legal member, would have to depend on his own resources.

1833. Mr. HARDIN went next into an argument on the duty of  
 23d Congress, the sheriffs to send a verified return of the votes to the  
 1st Session. clerks of the county courts, to be preserved among the re-  
 Debate. conti- cords of his office, and concluded by expressing a wish that  
 nued. the question should have a speedy investigation before the  
 committee, and a hope that both of the gentlemen would co-  
 incide in the adoption of measures to obtain it.

Remarks of Mr. Mr. ARCHER, of Virginia, contended that this was a ques-  
 Archer against tion, in the determination of which the country was deeply  
 the validity of interested, and which mainly concerned that House to de-  
 the certificate cide upon. He could not avoid expressing his unfeigned  
 produced by surprise at the observations that had fallen from several gen-  
 Mr. Moore. tlemen who had addressed the House on both sides of the  
 question. He differed from most of them. He contended,  
 as we understood him, that the House ought at once to de-  
 cide without referring it first to a committee; and that the  
 course proposed by several honorable gentlemen who had  
 preceded him went to abrogate the most important rights  
 and privileges of that assembly. What did the constitution  
 say? Why, that the House was to be the sole "judge of  
 the elections, returns, and qualifications of its own mem-  
 bers." It would be derogatory to the character of that le-  
 gislative body to say aught against this doctrine. To be its  
 own judge constitutes one of its subordinate usages. [The  
 honorable member's back was towards the reporter during  
 the greater part of his speech, and he was thence not dis-  
 tinctly heard.] The honorable gentleman proceeded to say  
 that it was only a common sense proposition to affirm that  
 there were two things essentially necessary to constitute a  
 good return; the one was, that it should contain sufficient  
 matter or a sufficient number of votes, and the other, that  
 those who made it out possessed adequate authority to do so.  
 If the certificate offered by a gentleman at the bar of that  
 House were deficient of either of these essentials, the return  
 was invalid. If it purported to be a report of a certain elec-  
 tion, and neither contained the required matter, nor was le-  
 gal in its forms, could they, he would ask, have the face to  
 say that such a document was good, and would entitle any  
 gentleman presenting it to take his seat in that House? He  
 was equally astonished that the House should already have  
 consumed so much time in this debate. The House had  
 now had the question before them for three days, and yet  
 the matter seemed to have progressed but little. He was  
 surprised that any gentleman would support the legality of  
 that paper, which proved its own inadmissibility. If it were  
 to be laid down that a mere return is sufficient to constitute  
 a right to take a seat in that House, then were both the  
 gentlemen qualified. The return was not only insufficient,  
 but self-contradictory, and, as he said before, proclaimed its  
 illegality.

The honorable member from New York (Mr. BEARDS-



LEX) contended yesterday that the certificate might be received as valid, because it contained a majority of the requisite signatures, and that the attestations of the three sheriffs were as binding as if the whole five had signed. He could not but be surprised at this, for that gentleman was a very eminent member of the legal profession, and he (Mr. A.) would appeal to the honorable member, as a lawyer, to say whether, in the event of a trustee refusing to execute the trust imposed upon him, or dying, the remaining trustee or trustees could go on with the trust. Would it not be indispensable to elect or appoint another in his room? The Legislature of the State of Kentucky had wisely provided for any such deficiency. If the doctrine thus laid down by the honorable member were followed out, they might have proxies every day, after the plan of the House of Lords of Great Britain. The members of this House; continued Mr. A., were the representatives of the people, and it was not in their constitutional power to substitute any other member than the one returned by a constituency. That paper, on which they had now been deliberating for three days, was stigmatized and branded as a nullity; and was it to be expected that such a document should entitle a man to exercise the highest privilege which it was in the power of the people of the United States to bestow?

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Remarks of Mr.  
Archer, of Va.

The honorable member proceeded to maintain that the House was there, to all intents and purposes, a court, and was then to be considered as exercising a judicial capacity. The principle of this was admirably defined yesterday by one of the members from Kentucky; and, concurring as he did with the views of that gentleman, he would ask if such a document as the certificate presented by Mr. Moore were offered as evidence in a court of justice, whether it would not be rejected. Because the return was imperfect, surely that House was not to be called upon to confirm it.

There was another view of the question, and one of great import, which should be considered, and that was, suppose a return was made, perfect in all its forms, and at the moment of presenting it a gentleman were to rise, and offer to prove at the bar of the House that that return was an imposition, would any honorable member tell him that the House was precluded from entertaining such an allegation? If a mere return were deemed sufficient qualification; then any one producing a required form became at once a member of that House. Suppose that in his own district, consisting of four counties, on the third day of the election, the sheriff, or deputy sheriff, or one of his friends, had taken away the poll books, knowing, perhaps, that he (Mr. A.) might have been in a minority, would his return have been sufficient? Ought he to be allowed the high privileges devolving upon a member of that House? He (Mr. A.) would not affirm that such a case had occurred, but he put the case, and sure



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Remarks of Mr. Hubbard in favor of the claim by Mr. Moore.

he was that the moment such a return was made known to the House, that return would be invalidated.

Mr. HUBBARD, of New Hampshire, differed entirely from the view taken of this question by the honorable member who had just sat down, though he considered himself no less zealous in the faithful discharge of his duty than the honorable gentleman himself. He concurred with him, however, in what he urged respecting the Committee of Elections, and should most probably vote with him on that point. He himself could not avoid expressing his astonishment at the somewhat extraordinary departure from the real question. He hoped that he should not be misunderstood; but a plain statement of facts was still requisite to be placed before them. The question to be deliberated was, does the certificate adduced to the House contain *prima facie* evidence of the due return of T. P. Moore as a member of that House for the fifth congressional district of Kentucky? Or, in other words, has Mr. Moore produced to the House such evidence as should qualify him to take a seat in that House? In his (Mr. H.'s) opinion, he had offered a sufficient qualification. If the document furnished that evidence, if it confessed on its face that an election had been held, and that Mr. Moore was duly returned, then he apprehended that, according to the usages of that House, the qualification tendered should be deemed sufficient, and the necessary oath at once be administered. He (Mr. H.) agreed with the view of the question taken by the honorable member from Kentucky, who last addressed the House, that if an election had taken place, it must have been in conformity with the laws of the State, and the only point at issue was, whether there had not been some informality in the notification of the return. What did the laws of Kentucky require? Not more than the statutes of other States of the Union deemed requisite under similar circumstances. In the State which he had the honor to represent in part, the votes were determined by the Governor and Council. In New York, he knew, as well as in other States, the form varied, but the principle was retained. A certain judicial tribunal is always indispensable. In the case before us, the laws of Kentucky expressly declare that the returns should be made to the sheriff, and that he should constitute the tribunal. He would ask if the paper did not furnish incontestable evidence of the return being good. The honorable gentleman proceeded to read an extract from the laws of Kentucky, respecting the forms necessary to be observed at elections, and to show that there was nothing before the House, which exhibited that a departure from them had taken place. He would take, he said, the very words of the act, and believed that there had been a compliance with the provisions thereof. The district was composed of five counties, constituting the fifth congressional district of the State of Kentucky; and the law provided that the sheriffs should assemble and

make the return. Did not the paper before the House state that the sheriffs had assembled? Had not that requisition of the statute been complied with? The law required the assembling and signing of the sheriffs; the certificate affirmed that they did this; and what more could be required? The honorable member here read the certificate, and went on to say that, in his opinion, if the paper furnished any evidence at all, it unquestionably showed that the sheriffs had proceeded to discharge the duty which devolved upon them by the act. If he understood it rightly, they performed their duty correctly; they compared the votes, and determined which had the majority; and they constituted the only tribunal before whom that matter could then be decided. They expressly certified that T. P. Moore was duly elected a Representative to Congress from the district in question, by a majority of qualified votes of that district. Then it was added that the vote of Lincoln county was not taken into calculation; but he was at a loss to know how, from that, the inference could be drawn, which had been by a gentleman who had preceded him, that the friend of one of the candidates had pocketed the poll book, and taken it away. It was a fact with which he (Mr. H.) was unacquainted, and how it came to the knowledge of that gentleman, he left him to explain.

He (Mr. HUBBARD) would contend that the only authority by which the House should be guided must be the return itself. He would put a case: supposing the county of Lincoln had held their meeting on a day not warranted by the statutes of Kentucky, and that the proceedings had been conducted in so confused a manner that it was not possible for the returning officer to ascertain who had the majority; suppose, further, that fifty votes had been counted when only twenty-five had been taken, would they have attested that return? Certainly not; they would have rejected it. There is not a word said on the certificate as to whether any votes at all were taken for the county of Lincoln. How, then, did it happen that the honorable gentleman knew that the friends of one of the candidates seized the poll book and took it away? He (Mr. H.) was clearly of opinion that the paper should be received in the character in which it spoke, viz. as an authentic certificate of the due return of T. P. Moore to that House.

Another matter for deliberation was, whether the officers should make the return *in propria persona*. He apprehended that that was not indispensable, and that a less number than the whole, provided they were a majority, was sufficient to comply with the directions of the statute. In the State, for instance, whence he came, it was the duty of the Governor and Council to receive the returns, to examine them deliberately, and, upon a faithful examination, to make a return of the election. This was specially enjoined, and yet it

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had rarely occurred that the whole number had assembled to perform those duties. In the State of New York, two persons were appointed to make returns to the town, the Attorney General, the Secretary of State, &c. ; but if one of those persons neglected to attend, the return, he apprehended, would not thereby be vitiated. The member entitled to the return would obtain the certificate of the officer, would come to the bar of that House, and be duly sworn as a member thereof.

Mr. H. said his principal object, before he sat down, would be to propose an amendment to the resolution of the gentleman from Kentucky, by giving the seat to that gentleman in whose favor the certificate had been made out, according to the invariable usages and practice of that House. Subsequent investigation should be referred to a committee, for that House, he contended, was not the tribunal before whom such an inquiry as was necessary should be made. If questions like the one before them were to be settled in this way, for what purpose were committees formed? and more especially the Committee of Elections? They were for the purpose of investigating facts, and producing evidence on which the House might adjudicate. The course heretofore pursued had been to take the certificate of the member in the first instance, to administer the oath to him; and, should any dispute have arisen of his return, to refer it to the Committee of Elections, who, upon due inquiry, would prepare a report, and upon that report the House would deliberate and adjudicate. He urged upon that House not to depart from its ancient usage, not to make a new precedent needlessly. If they decided according to the views of several honorable members, it would be the first time in which the House had exercised its dignity and honor in such a manner. He would call upon the gentleman from Virginia (Mr. ARCHER) to refer to a single case where the right of the member to take his seat had been disputed when he presented a certificate of his return. Had it not been the invariable usage of this House to qualify the member who lays his certificate upon the table? and then the evidence required is gone into before a committee. Moreover, he would oppose the decision at that time on the principle of expediency, since, if the House were to go into such matters, the many details incident to such inquiries would leave them nothing more to do. Let there be a scrutiny before a committee of that House, but he would claim for Mr. Moore the same courtesy that had been extended to every other member.

Mr. H. proceeded to argue that the omission of the result of the county of Lincoln did not invalidate the return of Mr. Moore. Surely, said he, if the paper in question had set forth a falsehood, the sheriff would ere then have come forward with a counter certificate. That fact, added Mr. H., went far to confirm the truth of the return. In conclusion,

he congratulated the House on the good temper with which that question had been debated ; not a single gentleman had spoken but in terms of unfeigned respect for both Mr. Moore and Mr. Letcher, and certain he was that nothing but a sense of duty had brought on the discussion. He had himself no other motive ; with one of the gentlemen he was entirely unacquainted, and had had little intercourse with the other ; but, exclaimed the honorable member, it was due to the individual himself, it was due to the members of that House, it was due to the nation at large, to receive the qualification presented by Mr. Moore. Every one who knew any thing about their elections, knew well enough that they were often contested ; but who ever heard before that the body he was then addressing had formed themselves into a committee for the purpose of collecting evidence of the return or non-return of one of its members ? The honorable member made a further reference to the laws of Kentucky as they bore on the case before the House, and offered the following resolution :

“*Resolved*, That the certificate presented by Thomas P. Moore, of his election as a Representative from the fifth district in Kentucky, furnishes *prima facie* evidence of his having been duly elected, and that he is now entitled to be sworn accordingly.”

Mr. HUNTINGTON, of Connecticut, commenced by declaring his intention to vote against the amendment proposed by the honorable member from New Hampshire, and for the reason that, in his judgment, it did not contain the truth. He could not agree with that honorable gentleman that the certificate contained *prima facie* evidence of the right of Mr. Moore to take a seat in that House. It seemed admitted on all hands that in relation to the laws of Kentucky, as bearing upon the question before the House, they were clear, distinct, and expressive ; and it seemed further admitted that those laws should be the rule by which the House should be guided. Moreover, it had been admitted by all the speakers that if an objection be taken to the credentials offered, and that they were not in themselves such as to satisfy the House that the individual presenting them was qualified to sit there as a member, he could not retain his seat. The whole question, said Mr. H., resolved itself into these two inquiries. First, was the paper presented to the Clerk's table properly and sufficiently authenticated, and was it such a document as should entitle a member to qualify himself for a seat in that House ? Out of that question resulted another, which was, did the paper bear upon it, the signature of those, and of all those, whom the laws of Kentucky said were requisite ?

The other question was, admitting that the certificate was properly signed, did it set forth that the person in whose

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Remarks of Mr. Hubbard.

His resolution for admitting Mr. M. to be sworn in.

Mr. Huntington in opposition to the claim of Mr. M.

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favor it was made out had been duly elected? If the paper were deficient of either of these requisites, and of course it was of both of them, the return was null and void.

He (Mr. H.) would first turn his attention to the validity of the certificate. The law of Kentucky requires that it should be signed by each of the sheriffs, whereas the certificate states that each of them were present; and yet it appeared that only three out of the five had signed it. The question arose then, whether it was legal, by the laws of Kentucky, that three sheriffs could certify for five, or, in other words, to the same purport, whether that which was required to be certified by five, could be certified to by three. That such an assumption was against the very letter of the law in this case, he believed not four persons within the reach of his voice would be found to deny. Five members composed the body, and were required by the law to sign the certificate. The only principle upon which the signature of three can be contended to be the signature of five, is, that the act of the majority is the act of all. The gentleman from New York (Mr. BEARDSLEY) had maintained yesterday, that any act of a public nature passed by a majority was a legal act. The gentleman, Mr. H. observed, was as unfortunate in the extent as in the application of his principle. It was not necessary for the House to examine how far the act of the majority of a public body was binding and legal; but he asked if any gentleman in that assembly would hazard his reputation by advancing the position, that where specific restrictions were made by an express statute, as in the present case of the law of Kentucky, requiring the signatures or certifications of *all* the sheriffs, a majority could do that which was especially required of all. The sheriffs assembled to prepare the returns of the votes were a unit, and could act only as such, and not by fractions.

After some further remarks, Mr. H. asked permission to cite a few cases by way of illustrating his argument.

Suppose this House, acting within its legitimate sphere, authorizes the *judges of the court* to ascertain the facts of any given question, the decision cannot be rendered by a majority of the judges. It would be otherwise if *the court* were authorized to inquire into the matter; for then a majority might pronounce upon the facts; but in the case of the judges the certificates of all would be requisite.

Another case he should suppose, by way of illustration, was this. If that House should appoint a committee to investigate and report upon any subject coming under its consideration, then the report would be accepted if signed only by a majority of the members of that committee; but if the House should have added a clause in its instructions, that the report should be signed under the hands of all the mem-



bers of that committee, then no gentleman in that House could contend that a majority report could be received. The distinction between the cases was clear and obvious.

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Mr. H. proceeded in relation to the law of Kentucky on the subject of congressional elections, and briefly recapitulated the heads of his preceding argument. He observed that the sheriffs attended the meeting with their poll books, and when the certificate was made out it was predicated that each one scrutinized and compared the votes, not only for his own district, but for all. This was a principle which, if departed from, would leave all elections determinable by their sheriffs in districts where there were only five of their officers. No exception could be taken to this position, unless the suggestion of the gentleman from New Hampshire (Mr. HUBBARD) was correct, that sheriffs are judicial officers appointed to judge in all matters appertaining to elections.

Debate continued.

Remarks of Mr.  
Huntington, of  
Conn.

He should not stop to inquire if the term judicial proceedings was applicable to the meeting of the sheriffs; but this he would say, that the law of Kentucky gave no authority to those officers; who were to sign the certificate of election, to reject votes. Their duty was to count the poll books; if they contained illegal votes, the remedy was provided by law. He wished to present a question to the House, which he considered the best question, as to this part of the subject. Had the requisitions of the law of Kentucky been complied with? What were these requisitions? They required that all the sheriffs should sign. It was specially provided by the law of Kentucky that such should be the case, to avoid abuses. Was this requisition complied with by the signature of three out of five, and that without any intimation of the reason why the other three did not sign? He had said all he had to say of the authenticity of the instrument. Was a majority of that House prepared to say that three meant five; or that a certificate signed by three was the same as a certificate signed by five?

But what did the certificate say? Did it say that Mr. Moore was duly elected? The gentleman from New Hampshire (Mr. HUBBARD) had said that, if he understood the language of the instrument, it did say so. He would analyze that certificate, and what did it state? It stated that the poll books of the several counties were presented; that the sheriffs were present; that they compared the votes, and found that T. P. Moore was duly elected, *the vote of one county not being counted*. The gentleman from New Hampshire seemed to consider this latter clause of the instrument as mere surplusage. No gentleman in that House, however, could make more or less of the certificate of Mr. Moore than this, that he had the majority of votes in all the counties which the sheriffs had chosen to count; and that they had not chosen to count the county of Lincoln. Now,



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suppose the certificate had stated in words, as it did in fact, that Mr. Moore was duly elected, having received a majority of all the votes of the fifth congressional district of Kentucky, excepting such as they (the sheriffs) had not thought proper to count. Would the members of that House in such a case solemnly say that a man so elected was duly elected? Suppose, instead of omitting to count one county, they had omitted to count two; that Jessamine county had been omitted as well as Lincoln. Surely no one would contend that a man thus elected was duly elected. But let them go further, for the principle was the same; let them say that T. P. Moore was duly elected by two counties, the other three counties not being counted: nay, they might on the same ground certify that he was elected, all the counties not having been counted except one. The substance of the argument of the gentleman from New Hampshire was this, that, being a judicial act, if only a majority of the sheriffs signed, it was valid. But it would be seen, if gentlemen looked further into the language of the certificate, that it was a qualified declaration; that, after declaring Mr. Moore duly elected, it was superadded that all the votes of the district were not counted; and yet the House were called on to say, upon the face of this certificate, that Mr. Moore had a majority of the qualified votes of the district. It seemed to him that the House ought to take the plain common sense meaning of the language of the laws of Kentucky, in comparison with that of the instrument, and they would then find that it had neither authenticity nor substance. The law required that the instrument shall be perfectly signed. But the present one was not so signed; it was not satisfactory evidence as to the results of the election. So much as to the merits of the question, as presenting a new case. He would make one observation as to precedents. It seemed to be impressed on the minds of some gentlemen that they were called on to depart from former rules and usages. But, in his opinion, no case had ever previously presented itself to the House, in which a member was refused the oath, inasmuch as he proffered at the table an instrument which was not properly signed. To take a contrary course would be subversive of all the laws of election, and the rights of the elector. Suppose a citizen of the District of Columbia should present himself with a paper, which he called a certificate, at their doors, would they administer the oath to him, and permit him to take his seat? The question then was, whether the credentials of T. P. Moore were properly authenticated. In all the cases which had heretofore come before the House, this subject had not been touched upon; but, if one hundred cases should be produced, he thought the good sense of the House would not decide that any paper which might be presented would entitle a member to take his seat. What were the precedents? There were

members then in that House, who were in Congress when the cases cited as precedents were under consideration.

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He would appeal to those gentlemen if, in any of those cases, upon the credentials being presented, an objection had been made to the members taking their seats. No, their credentials had all been passed. The objections had arisen subsequently. To show the bearing of the cases cited on the present, a case must be produced in which the credentials of a member were refused. But he would beg leave to call their attention to one other subject, which would utterly destroy the analogy betwixt the present case and those which had been alluded to. In every one of those cases the member presenting his certificate had offered a certificate duly signed. In the case of the contested election in New York, it was expressly stated in the report of the committee that the certificate had been duly signed; that there was but one Silas Wright in the district, and that therefore all the votes given to Silas Wright belong to the Silas Wright mentioned in the returns of the district. The present case was altogether different. The credentials of Mr. Moore were objected to; were met on the very threshold of that House; and were declared, as he believed them to be, a mere nullity—a piece of blank paper, signifying nothing. The House then was brought back to the point, to answer ay or no to these two questions: was the paper presented at the table of the House by Mr. T. P. Moore, properly authenticated, according to the laws of Kentucky? and, also, did it contain on its face a majority of all the votes in the fifth congressional district of the State of Kentucky? The member who voted ay must say this: that the law of Kentucky, which says that the certificate of a member returned shall be signed by five members, is complete with the signatures of three, and that the law which says that a member shall be returned, according to the majority of votes in five counties, is answered by the return of a member elected upon the majority of votes in three.

Debate continued.

After some further remarks, which we regret to say were inaudible at our desk, Mr. H. concluded by observing that he did not wish to stand upon forms merely, but he thought there was an important principle involved in the question. If they permitted, in this case, the majority of the sheriffs of a district to declare that a certain individual was elected, it would place the election of others at the discretion of a similar majority. Were they prepared thus to decide? Was such the intention of the laws of Kentucky, or rather had she not expressly guarded against such an evil? He thought, for these reasons, that the certificate of Mr. Moore was merely a piece of blank paper, and that it did not entitle him to take his seat.

Mr. JONES, of Georgia, apologized for troubling the House on the present occasion, being so young a member; but, al-

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though a young member, he was not altogether unacquainted with the principles in which the question before them must be decided. It appeared to him that gentlemen had not taken into consideration the difference betwixt a ministerial and a judicial officer. It appeared to him that the sheriffs in this case were purely ministerial officers. Leaving then the laws of Kentucky out of the question, and considering the sheriffs in their true character as ministerial officers, did they return opinions or facts? And could they return even facts out of their respective counties? He thought not, for the law of Kentucky expressly required the returns of all the sheriffs. The question was not, if the certificate proffered was the *best* evidence; but if it was evidence at law, whether, in fact, it was any evidence at all. He thought it was not evidence at law, inasmuch as it did not comply with the requisitions of the election laws of Kentucky, which required the signatures of five sheriffs. Gentlemen had said that a majority of sheriffs might sign a certificate. He dissented from this opinion. He would cite an example in illustration. Suppose a case in which there were three candidates. That one should produce a certificate signed by two sheriffs; another, a certificate signed by four; whilst the third candidate claimed to have the majority of votes. In what a dilemma would the House then be placed. Two individuals would have a majority. This was not the only difficulty. Mr. Letcher had produced his certificate, in which it was certified that the majority of qualified voters in the whole five counties had given their votes in his favor. It had been argued, and correctly argued, that he who had such a majority was the member entitled to the seat. If they decided otherwise, it would place the House in the dilemma which he had just stated.

It had been argued, that it did not appear on the face of the certificate that any poll had taken place in the county of Lincoln. It was not so. It was evident, from the certificate itself, that a poll had taken place. He would read the language of that document. [Here the honorable member read the certificate of Mr. Moore.] He would call the attention of the House to the concluding statement, that the vote of Lincoln county had not been counted. It was plain from the caption that it was intended that all the sheriffs should sign; but when the time arrived for their signing, it was found that two of the five would not sign, because the sheriff of Lincoln had chosen, for some reason, to withhold the poll book containing the returns from that county. They were not left in the dark on this point. It was clearly shown that there were books there, and that the votes they contained were not taken; otherwise it would have been so stated. If the officer had neglected to take the votes, the fact would have been expressed on the certificate. They were expressly told therein that the votes were taken, but not counted. He would

not go into the question why the sheriff of Lincoln county had acted as he had done. The House must come to the conclusion that the certificate was not properly signed, unless they were prepared to meet the difficulty he had previously stated, of deciding that three persons might be entitled to one seat, because they had something like a certificate. When a committee of that House should have determined which of the candidates had the majority of the votes of the qualified voters of the district, that person should be allowed to take his seat, and no one until then; otherwise it would be actually offering a premium or reward to the man who could best practise the arts of corruption and venality.

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Mr. BEARDSLEY said he conceived that gentlemen were mistaken in supposing that it had been argued that the House had not the power of looking back to facts and circumstances connected with the certificate which had been offered by Mr. Moore at the table of the House. The argument which he had heard was, that the *usual* mode of proceeding was, not to go behind a certificate on a question as to its validity. The gentleman from Kentucky (Mr. Moore) had presented his certificate, which he said was in accordance with the laws of Kentucky, and on which he had claimed his seat. Had they not all done the same thing? They had all presented their certificates to the Clerk of the House, and had all come up to be sworn in virtue of such presentation. No objection had been made to any but the certificate of the gentleman from Kentucky; and yet it would have been competent, if the doctrine now advanced was the correct one, for any gentleman to have objected to any one of them. But would it have been proper in such case to refer the subject to a committee, or for the House to decide the question at once, and on the face of the instrument itself, if the member presenting it was entitled to a seat?

Views of Mr.  
Beardsley, of  
N. Y.

The simple question was, did the certificate comply with the requisitions of the laws of Kentucky? He agreed, that to be valid it must so comply, or it could not be received by the House, nor the gentleman be permitted to take his seat, were they to give the laws a literal construction, or to decide according to their spirit. Some gentlemen had said that the power of signing the certificate could not be performed by a deputy, because the act expressed that it should be done by the sheriff himself. Since he had heard this argument advanced, he had had the curiosity to look at some of the returns made to the Governor of Kentucky, and he believed that the majority of the returns of members in that State was signed by deputies.

Mr. HARDIN, of Kentucky, explained, disclaiming, as the reporter understood, having advanced the argument stated by the gentleman from New York.

Mr. BEARDSLEY resumed. He had then misapprehended the gentleman, and should waive further argument on this

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point. Mr. B. then went into an examination of the language of the certificate. If it were taken literally and read by fragments, it would appear to be the certificate of five sheriffs; but if read further, it was otherwise. He inferred from its language that only three had convened and signed. The sheriffs had met and adjourned from day to day; the certificate stated that they had faithfully added and compared the votes that were presented, and that, after this faithful comparison and addition, they had found T. P. Moore duly elected. It was said that if they took the residue of the certificate, it would show that they had not examined all the votes returned. He did not think any evidence was deducible from that instrument that there had been any return for the county of Lincoln; and the law did not provide that the sheriffs should not proceed in their duty as canvassing officers, because certain votes had not been returned.

Mr. HARDIN read an amended resolution, to the effect that, until the Committee of Elections had decided on the question, and reported to the House, neither Mr. Moore nor Mr. Letcher should take the seat, and that testimony and depositions should be taken by the committee.

Mr. HUBBARD then withdrew his amendment.

Mr. POLK proposed a modification to Mr. HARDIN's resolution, to which Mr. HARDIN assented.

Mr. ARCHER asked a division of the question.

Both parties agree to waive their claim to the seat until the case is reported on by the committee.

Mr. POLK explained the object of the latter proposition, which was agreed upon by both the gentlemen who were the parties.

Mr. HARDIN also stated that it met the concurrence of both Mr. Letcher and Mr. Moore.

Mr. ARCHER opposed it as a compromise of the dignity and rights of the House.

Mr. POLK would yield to no gentleman in regard to the honor, the dignity, and the rights of the House, and his fellow-citizens in general. He explained that the honorable member who spoke last, had not comprehended what fell from him, (Mr. P.) He had not contended that his object was to exclude inquiry, nor that a single fact tending to elucidate the matter should be withheld; and he would ask, supposing Mr. Moore were allowed to take his seat, what right of that House would be affected; or what right of the representation would be affected? There was testimony already taken, which had been the work of months to collect, and would be a labor of equal time to go over again. All he would call upon the House to do, would be to proceed precisely after the manner they had always hitherto done; and denied that there was so great a principle involved in the matter as some gentlemen had apprehended.

Mr. DAVIS, of Massachusetts, expressed his surprise that the question should then appear under another shape than at first, since, from what had fallen from the honorable member



for Tennessee, he inferred that it was reduced to a matter of compact and agreement. He was unwilling to give instructions to a committee on a subject of which he was himself uninformed. After some further remarks, the honorable member concluded by expressing his dissent from the second resolution, and his intention to vote against its adoption. 1833.  
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Mr. POLK cited a precedent for giving instructions to a committee. The case was that of Michigan. He denied that the House would be sanctioning a bargain by adopting his (Mr. P.'s) resolution.

Mr. T. BURGESS proposed an amendment to the resolution respecting the taking of evidence, to which Mr. POLK had no objection.

Mr. HARDIN explained that Mr. BURGESS's amendment was unnecessary.

The resolutions as agreed to are as follows :

"1. *Resolved*, That the Committee of Elections, when appointed, inquire and report to this House who is the member elected from the fifth congressional district of the State of Kentucky ; and, until the committee shall report as herein required,

"2. *Resolved*, That neither Thomas P. Moore nor Robert P. Letcher shall be qualified as the member from said district.

"3. *Resolved, further*, That the Committee of Elections shall be required to receive as evidence all the affidavits and expositions which may have been heretofore, or which may hereafter be, taken by either of the parties, on due notice having been given to the adverse party or his agent, and report the same to this House."

In virtue of these resolutions, the case was submitted to the examination of the Committee of Elections, by a majority of whom the following report was made on the 6th of May. On the 9th of May, a *minority* of the committee, consisting of Messrs. GRIFFIN and BANKS, made a report to the House, in which they submitted their reasons for dissenting from the views adopted by the majority.\* The statement and the arguments of each party, together with their comments upon the evidence, are annexed to the principal report. The case referred to the Committee of Elections.

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Mr. JONES, of Georgia, from the Committee of Elections, made the following report :

The subject presented itself as one entirely new and unprecedented. Thomas P. Moore, Esquire, had a certificate from three only of the five sheriffs, and Robert P. Letcher, Esquire, a majority of the votes upon the poll books of the five counties composing that district. As Mr. Letcher had no certificate, and that of Mr. Moore was not signed by *all the sheriffs*, as required by the law of Kentucky, neither Report of the Committee of Elections.

\* For this report of the minority see page 811, *post*.



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Report of the  
Committee of  
Elections.

The sheriff cul-  
pable for with-  
holding the  
poll book.

could produce a satisfactory testimonial of his election, and consequently neither was permitted to take his seat.

The act of Alfred Hocker, the sheriff of Lincoln, in withholding the poll books of that county from the sheriffs assembled at Harrodsburg to compare and count the votes agreeably to law, and by which Mr. Letcher was deprived of the legal and regular certificate, was wholly unauthorized by law, and a violation of his duty as an officer. He had no authority to examine into the legality of the votes which had been given to either party. His duty, in conjunction with the other sheriffs, was to compare the polls and count the votes; to ascertain the result, and to deliver the certificate to the successful candidate. In the absence of all proof, other than his refusal to permit the poll books of his county to be examined and counted, the committee would have been constrained to declare his conduct had proceeded from improper and corrupt motives; but a number of witnesses of high standing and respectability bear ample testimony to the rectitude of his character, and to his reputation for honesty, integrity, and honor. While your committee therefore yield to this evidence in his favor, and willingly believe in the innocence of his intention, and the purity of his motives, they feel it due alike to themselves, to Mr. Hocker, and to the country, to stamp the act with their marked and decided disapprobation.

As it had been anticipated by both gentlemen that the matter would be brought before the House for adjudication, they had proceeded, perhaps informally, to take depositions, to which, by consent, all objections were honorably waived, when an opportunity had been given to cross-examine the witnesses. As soon as the committee had convened, it was made known to them that many depositions were yet to be taken, upon which, at the suggestion, and for the accommodation of both parties, time was given until the first day of January, then next inclusive, in which to take and complete their testimony, as will be seen by the following resolution:

“Whereas the people of the fifth congressional district of the State of Kentucky are at present unrepresented in the present Congress, it is expedient that the decision of the question between the two persons contesting the right to represent said district be made as speedily as may be, consistent with due inquiry and deliberation.

“*Resolved, therefore,* That the chairman be directed to notify Thomas P. Moore and Robert P. Letcher, Esquires, that this committee will not proceed to a decision upon the question depending between them, until after the first day of January next, at which time the committee will expect the proofs to be closed, and will not receive any testimony taken after that time.”

Time given for  
taking testimony.

Owing to the distance of the places at which the examinations were to be made, the parties, with their evidence, did not reach here until about the middle of January. As soon

as the committee were apprised of their arrival, they met, and found a mass of testimony comprising not less than eighteen hundred pages. Believing that the parties were well acquainted with their witnesses, and the facts proved by them respectively, and that they would be better able to investigate the subject, and present it to the committee in a much shorter period, the following resolution was adopted :

“ *Resolved*, That Messrs. Letcher and Moore have leave to take the papers and depositions relative to the election for a Representative in Congress for the fifth congressional district of the State of Kentucky, they leaving in the committee room a receipt for the same ; and that they be invited to make out a brief of the points, the law and testimony relative to the disputed votes, and, if there be any which they can mutually agree to be bad or good, to make a list of them respectively.”

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Report continued.

Parties to make a brief of their testimony.

To this both gentlemen very politely assented, and the papers were forthwith delivered to them. They immediately commenced, and applied themselves to the task with great labor and indefatigable industry ; and about the middle of March, each presented abstracts of the evidence on which they respectively relied, for the consideration of the committee. They have also presented arguments in support of their respective claims, which are herewith submitted, marked A and B.

By the constitution of Kentucky: “ In all elections, every free male citizen (negroes, mulattoes, and Indians, excepted) who at the time hath attained to the age of twenty-one years, and resided in the State two years, or in the county or town, in which he offers to vote, one year next preceding the election, shall enjoy the right of an elector ; but no person shall be entitled to vote, except in the county or town in which he may actually reside at the time of the election.”

Qualifications of electors in Kentucky.

With few precedents to guide them, and having to decide upon nearly 400 votes objected to, presenting every variety of question of evidence, law, and facts, which could possibly arise, it was deemed proper to adopt some rules for their government, and the following resolutions were passed :

1. *Resolved*, That an individual having the right of suffrage in Kentucky, does not lose it by removal from the State *merely*, but there must be evidence of his *intention* at the time he departs to leave the State *permanently*, or proof of his permanent location elsewhere, to forfeit his right as a voter.

Rules for decision, adopted by the committee.

2. *Resolved*, That no name be stricken from the polls as *unknown*, upon the testimony of one witness *only* that *no such person is known* in the county ; and that where a man of like name is known, residing in another county, some proof, direct or circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed.

3. *Resolved*, That all depositions not subscribed by the witness be excluded, unless the certificate of a magistrate be sufficient, according to the law of Kentucky.

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Report conti-  
nued.

Rules adopted  
by the commit-  
tee.

4. *Resolved*, That votes recorded upon the poll books as given to one candidate, cannot be changed and transferred to the other by oral testimony.

5. *Resolved*, That all declarations or statements made by voters *after the election*, relative to their right of suffrage, be rejected.

6. *Resolved*, That we will receive no testimony taken after the 1st day of January, 1834.

7. *Resolved*, That when a man is found on the poll book, proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book, and that some proof, direct or circumstantial, other than finding the name on the poll book, will be required of the vote having [been given] by such minor in the county or precinct where the vote is assailed.

8. *Resolved*, That the residence of young men from other States and counties, at schools, academies, or colleges, as scholars or students, is not such a residence as entitles them to the right of suffrage in the county where they are for the time being, and that all such votes be stricken from the poll book.

Statement of votes given to each party. Upon an examination of the certificate of the Governor of Kentucky, it will appear that Thomas P. Moore, Esq. had in the four counties of Mercer, Garrard, Jessamine, and Anderson, a majority of one hundred and five votes; and an examination of a copy of the poll books of Lincoln shows that Robert P. Letcher has, in that county, a majority of one hundred and forty-nine, from which, deducting the 105 for Moore in the other four counties, will give Letcher a majority of forty-four votes in the five counties composing the fifth congressional district.

From an examination of the copies of the poll books, duly certified by the clerks of the different county courts, it appears that, in the county of Jessamine, Moore has four hundred and eighty-nine votes, and Letcher has five hundred and eighty-one; in the county of Lincoln, Moore has five hundred and one, and Letcher has six hundred and fifty; in the county of Anderson, Moore has four hundred and thirty-six, and Letcher has one hundred and ninety-nine; in the county of Garrard, Moore has two hundred and forty-seven, and Letcher has one thousand and seventy-five; in the county of Mercer, Moore has fourteen hundred and sixty-eight, and Letcher has six hundred and eighty-five; giving Letcher in all the counties a majority of forty-nine votes.

It will be for the House to determine whether it will consider the certificate of the Governor, or the certified copies which have been sent from the different counties, as furnishing the best evidence of the true situation of the polls, and the result of the election. According then as the House shall determine, Letcher's majority will be either forty-four or forty-nine. The committee then proceeded to purge the

polls, under the rules which had been adopted, according to the testimony which had been taken by the parties impugning their legality. In discharging this arduous duty, it will be readily conceived the committee had many and perplexing difficulties to encounter. Disregarding these, and anxious to arrive at the facts, they have diligently and with great care examined all the evidence relative to each contested vote. The committee are not unaware that many errors may have been committed, which might have been avoided if they could have had the witnesses examined before them, when all doubts might have been cleared up, and all difficulties explained away. They are satisfied, however, it was not in their power to render more justice to the subject, under all the circumstances with which it was attended.

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Report continued.

Several persons were objected to by Mr. Moore, because they were deaf and dumb. By the constitution of Kentucky, "in all elections by the people, &c. the votes shall be personally and publicly given *viva voce*." William Moorhead, David Arnett, and John Withers, voted for Mr. Letcher, and were proved to be deaf and dumb, but that they were intelligent, and could read and write. The objection was urged upon the constitutional requisition that all votes should be given "*viva voce*," and that it was physically impossible for them to comply with it. Upon the letter of the constitution, and the authority of the case of Williams and Mason, decided in the Senate of Kentucky, a copy of which, marked C, is herewith presented, where James Yocum, a voter, was excluded because he was deaf and dumb, the committee were at first disposed to sustain the objection. Subsequent reflection, however, induced them to give the constitution of Kentucky a more liberal construction, and the votes were retained. Again: It was alleged by both parties that the votes of several persons were not correctly entered; that some were stricken off after they had voted; and that some were not only taken from one party, but had been given to the other; and while each objected to the alterations made against himself, he was unwilling to allow a change in favor of his opponent. The committee believed they all rested upon the same principle, and upon the authority of the case of Williams and Mason, above cited; and the reasons which governed the committee in that case determined them not to alter the poll books, but to leave them as they were presented. The corrections were made by officers acting under oath, and were correct and proper to be done, or they were incorrect and corrupt, and fraudulently made. The committee must believe that the officers who presided at the election had faithfully discharged their duty, and made up and certified a correct return of the election at which they presided; or that they had violated their oaths, and made a corrupt and fraudulent return. In making these alterations, they could not have acted innocently, and in good faith, un-

Votes by persons deaf and dumb allowed to be received.

The poll books received as authority, though alterations appear to have been made in them.

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Report conti-  
nued.

Changes ap-  
pearing in the  
poll book.

Of the residence  
necessary to  
qualify a voter.

less they have acted correctly, and they are proved to be men of fair standing and irreproachable characters. Indeed, no intention to act fraudulently is even imputed to them. Every principle of justice then required that they should not be condemned unheard, and without sufficient testimony.

Alexander West and John Brady, who swore they voted for Moore, and were entered for Letcher, were therefore not changed. Reuben Manifee, Rowland Shields, Owen Hocker, Moses Gaines, Fielding Hall, Peter A. Hall, who voted for Moore, and whose names were erased by the judges of election, were not restored. Vincent Inge swears he voted for Letcher, and we find Wilson Inge for Moore, and left it so. David Robertson, Jacob Coffman, William Jenkins, Reuben Young, and John McHan, who swore they voted for Letcher, and that their votes were put down for Moore, were also permitted to remain.

Upon the constitution of Kentucky, allowing to every male over the age of twenty-one to vote in the county where he was actually residing, provided he had resided in the State two years, many questions of extreme nicety arose as to the county in which was the residence of the person who voted. The committee had to ascertain what was the residence contemplated by the constitution of Kentucky, and fortunately they were not left entirely to their own opinions in the determination of this question. In the case of Williams and Mason, Stephenson, Ellison, who had been in Texas, and out of the State five years, was considered by the committee still a resident so as to entitle him to vote in Kentucky. The construction which they placed on the residence required by the constitution of Kentucky, is the same which has been given to the term "home" in the vernacular tongue, and to the term "domicil" by the writers on the civil law. In this view your committee fully concur, and, therefore, concluded to allow the votes of all such persons living in the county for the time being, unless the business which brought them to that county was merely temporary, or unless they had some actual home or domicil in some other county or State. Under this construction were decided the votes of journeymen mechanics, and all other laborers having no fixed and settled residence, but remaining for the time where they could get employment. There were some votes, however, decided under this rule, which merit more particular mention. At Centre college, in the county of Mercer, were many theological students, some from other counties, and some from other States. Many of them were proved to have other homes, and to be only remaining at Centre college, in that county, to complete their education. These men could not be entitled to vote in the counties where their fathers respectively resided, and also in the county in which the college is situated. If any of them had been at their family residence, they would unquestionably have voted, and the



committee can find no principle or authority which would have warranted their rejection; and it is equally clear they were not in such a situation as would authorize them to select in which of two counties they would exercise their elective franchise. A majority of the committee, therefore, determined that Centre college was not the residence of those students, contemplated by the constitution of Kentucky, and rejected their votes.\* One of these, Robert McKeown, swore he was raised in Jefferson county, Kentucky, where his mother now resides; that he has been at Centre college more than two years, and expects to go East to complete his studies, and thence where Providence may seem to direct; and he was rejected as having no residence in Mercer which entitled him to a vote there. Some of the students of that college, and also of law, were at the residence of their fathers, and voted, and the committee unhesitatingly sanctioned their votes.

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1st Session.

Report continued.

Of the votes of  
students at college.

Upon an examination of the testimony exhibited by the parties, the committee have found, in the county of Jessamine, seventeen bad votes given for Mr. Letcher, and two for Mr. Moore; in the county of Anderson, five bad votes given for Mr. Letcher, and three for Mr. Moore; in the county of Lincoln, ten bad votes given for Mr. Letcher, and four for Mr. Moore; in the county of Garrard, thirty-one bad votes given for Mr. Letcher, and five for Mr. Moore; and in the county of Mercer, eighteen bad votes given for Mr. Letcher, and twelve for Mr. Moore; making in all eighty-one votes not qualified for Mr. Letcher, and twenty-six for Mr. Moore, being fifty-five more bad votes taken for Letcher than for Moore.

If it should be determined to take the copies of the poll books in preference to the certificate of the Governor, the polls will stand thus:

	For Letcher.	For Moore.
Jessamine, . . . . .	581	489
Anderson, . . . . .	199	436
Lincoln, . . . . .	650	501
Mercer, . . . . .	1,075	247
Garrard, . . . . .	685	1,468
	3,190	3,141
From this deduct bad votes, . . . . .	81	26
	3,109	3,115

In addition to the objections arising from the disqualifications of voters, an objection was made to a number of votes given at Lancaster, in the county of Garrard, as not taken in the manner prescribed by the law of Kentucky.

By the law of Kentucky, "the justices of the county court shall, at their court next preceding the first Monday in August, in every year, appoint two of their own body as

\* This decision was overruled by the vote of the House.



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1st Session.

Report conti-  
nued.

Of the appoint-  
ment of elec-  
tion officers in  
Kentucky.

judges of the election then next ensuing, and also a proper person to act as clerk."

"And in case the county court shall fail to make such appointments, or the persons appointed, or any of them, fail to attend, the sheriff shall, immediately preceding every election, appoint proper persons to act in their stead."

"The sheriff or other presiding officer shall on the day of every election open the polls by ten o'clock in the morning."

"The judges of the election and clerk, before they proceed to the execution of their duty, shall take the oath prescribed by the constitution. They shall attend to the receiving the votes until the election is completed, and a fair statement make of the whole amount thereof."

"The persons entitled to suffrage shall, in the presence of said judges and sheriff, vote personally and publicly *viva voce*."

The justices of the county court of Garrard county appointed Isaac Marksbury and Wm. Wheeler, Esquires, to preside at the Lancaster precinct. Isaac Marksbury, Esq. declined serving, and the sheriff appointed Lewis Landrum, Esq. to act in his place. About nine o'clock on Monday morning, the first day of the election, Wm. Wheeler, Esq. not having arrived, the sheriff appointed Moses Grant, Esq. to act in his stead, and the polls were opened under the superintendence of Landrum and Grant, justices, and Thomas Kennedy, the sheriff. About ten o'clock, and after many votes were taken, Wm. Wheeler, Esq. arrived, and took his seat as one of the judges of the election, and Grant left the bench.

Votes taken  
while Grant  
acted as judge  
of election, &c.

Before Wheeler took his seat, and while Grant was acting as judge, Isaac Marksbury swears there were between twenty and thirty votes taken; of the first twenty-five, as appears by the poll book, twenty-two were given for Letcher, and three for Moore. On Tuesday, the second day of the election, Thomas Kennedy, the sheriff, in consequence of the extreme illness of his wife, left the courthouse shortly after ten o'clock, and the two judges, Wheeler and Landrum, continued to receive votes without any sheriff attending, until about one o'clock, when Jesse Yantis, the deputy sheriff, arrived. During the absence of the sheriff, and before the return of the deputy, about forty-five or forty-six votes were taken. Samuel Woods swears when he voted Kennedy cried his vote, and a few more were cried while he talked with Esquire Landrum, which was about one-quarter of an hour. When he was done talking with Landrum, and turned round, Kennedy was gone. Beginning three or four votes below Samuel Woods, in the forty-five succeeding there will be thirteen for Moore, and thirty-two for Letcher. The law of Kentucky provides, "unless the sheriff or one of the judges shall know that the person offering to vote is entitled to suffrage under the constitution,

the clerk shall administer to such person the following oath or affirmation," &c.

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There can be no doubt that Thomas Kennedy, the sheriff of Garrard, was not authorized to appoint Moses Grant to act in the place of Joseph Wheeler until ten o'clock. As the law required the polls to be opened *by ten o'clock*, it obviously intended until that time should be allowed for the arrival of the judges and clerk appointed by the court, before the sheriff could execute the trust confided to him. It has been alleged, in excuse of the sheriff and justification of the act, that it is customary to open the polls in Kentucky before *ten o'clock*; and that the law only prescribes that the polls shall be opened *by ten o'clock*, and does not prohibit the opening of them before that hour. While the committee feel the full force of the distinction, and might consider the votes legally taken if received before ten o'clock by the judges appointed by the court, they cannot believe the sheriff would be authorized to appoint any persons to act in the place of those appointed by the court before that hour. They cannot be said to have *failed to attend* until the hour pointed out by law for opening the polls shall have arrived, and, until they have *failed to attend*, the sheriff has no power to appoint. It cannot be readily seen where the mischief would end, if the sheriff might, or might not, at his discretion, appoint other officers before the hour of ten; and open the polls under their superintendence. If he can appoint an hour before, what is to prevent him from exercising this power of appointment, and open the polls at one o'clock in the morning, and take in illegal votes for his friend, when there are none present friendly to the opposing candidate to challenge them? Nothing but his own discretion.

Report continued.

The sheriff's appointment of Grant supposed to be illegal.

This would be too dangerous a power to be left in the hands of any man, and the law has wisely fixed a time by which the polls must be opened, and at which the persons appointed by the court must be present. Although the committee are of opinion that the law did not contemplate any appointment by the sheriff until ten o'clock, they might not have rejected the votes taken before that hour, if Grant had continued to act, and "attend to receiving the votes until the election was completed, and a fair statement made of the whole amount thereof." But Grant and Wheeler could not both be legal judges of the election. The sheriff was not authorized to make a temporary appointment; he could have waited until ten o'clock, the time allowed by law for opening the polls, and if Wheeler had not then arrived, he ought then to have appointed another in his stead, who should have continued to act "until the election was completed."

There can be as little doubt that the votes taken by the two judges in the absence of the sheriff were also illegal. The law is imperative, that "the persons entitled to suffrage shall, in presence of *said judges and the sheriff*, vote person-

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1st Session.

Report conti-  
nued.

Of votes taken  
in the absence  
of the sheriff.

ally and publicly *viva voce*." These votes were not given in the presence of the sheriff any more than those given on the first day before ten o'clock were given in the presence of the judges appointed by the court. And it is important and necessary they should be given in the presence of both the judges and the sheriff. If we can dispense with the sheriff, we can dispense with one of the judges, and as well with both judges as with one. The law contemplates the *indispensable presence of them all*, to whom the voters may be probably known, and to save the time and trouble of administering an oath to the persons applying to vote. It is unnecessary to inquire whether the persons thus voting were qualified and entitled to vote, if the officers or persons presiding were not qualified to hold the election and receive the votes. The State has the right to *prescribe the manner* of holding the election, and those votes were not taken in the *manner* prescribed by the laws of Kentucky, and were therefore illegally received.

In deciding upon the illegality of the course pursued by the sheriff and judges who held the election at Lancaster, the committee would not be understood to impugn the motives of those gentlemen. The committee are gratified they have it in their power to declare that the testimony which has been exhibited affords high evidence of the respectability and integrity of those officers.

Referring to the contested elections which have heretofore been adjudicated, the committee find, in 1791, in the contest between Jackson and Wayne, of Georgia, the House determined, when three justices were by law required to preside at an election, it could not be held by two, and the election was set aside.

Argument  
from former  
precedents.

In 1793, Patton was returned from the State of Delaware, and took his seat, and his right was contested by Latimer. The law of Delaware provided "that every person coming to vote for a Representative, &c., shall deliver in writing, on one ticket or piece of paper, the names of two persons inhabitants of the State, one of whom at least shall not be an inhabitant of the same county with himself, to be voted for as Representative." In Sussex county, sixty-eight persons presented only the name of Patton, and nine only the name of Latimer. Patton had 2,273 votes, which, after taking off the 68 illegal votes given in Sussex; left him only 2,205 votes. Latimer had 2,243, to which were added four which had been improperly rejected, and deduct the nine illegal votes given to him in Sussex, made his poll 2,238, and gave him a majority of 33 votes. This was done by the Committee of Elections, and concurred in by the House. Patton was deprived of his seat, and Latimer was declared entitled to it.

In 1795, Morris was returned a member from Pennsylvania, and died before the commencement of the session. Richards claimed the seat as duly elected. The votes taken in

Bucks county were not taken in the manner prescribed by law, and were rejected, which gave Richards a majority, and he was declared entitled to take his seat.

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In the same Congress (1795) a contest arose between Lyon and Smith, of Vermont. Two towns had given no votes, because no notice had been sent to them by the proper officer. The House decided that Israel Smith was entitled to the seat, although the votes of those towns might have altered the election.

Report continued.

Precedents cited.

In 1804, McFarland contested the election of Purviance, of North Carolina, for irregularity in holding the election in several of the counties. The House set aside the poll taken in the county of Montgomery, and gave Purviance the seat, upon the votes given in the other four counties of the district.

In 1805, Spaulding contested the right of Mead to his seat. By the law of Georgia, "the election returns must be made in twenty days to the Governor, and he must issue his proclamation in five days after." Returns from three counties (Camden, Liberty, and Tatnall) did not reach the Governor within the twenty-five days, and Mead received the certificate. The House counted the votes taken in those counties, and declared Spaulding entitled to the seat.

In 1807, McFarland contested the election of Culpepper, for irregularity in holding the election in several counties. The House decided that the election was illegally held in three of the five counties composing the district, and set aside the election.

In 1813, Bassett contested the right to the seat of Bayley from Virginia. [The law] requires the sheriff to close the polls the first day, unless rain or high water, or too great a number of votes to be taken in one day, makes it necessary to keep them open on other days. It was proved that nothing occurred to prevent the polls being closed in Accomac county on the first day, and that the sheriff kept them open on the two succeeding days. The votes taken on those two days were decided to be illegally received, and rejected, although the voters were legally qualified.

In 1816, the seat of Scott, of Missouri, was contested by Easton. The law required there should be three judges and two clerks to hold the election. At Cote Sans Dessein there were but two judges and one clerk; and the election at that place was set aside, and Scott deprived of his seat.

The committee have thus endeavored to collect and present to the House all the adjudications which have been made, and upon the authority of which they have determined to strike off all the votes given at Lancaster, while Moses Grant, Esq. was presiding on the first day, and all given on the second day during the absence of the sheriff. Of the votes taken at Lancaster during the time Grant presided, twenty-two were for Letcher, and three for Moore; and of those taken while there was no sheriff attending, thirty-two

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1st Session.

Report conti-  
nued.

Statement of  
results.

were for Letcher, and thirteen for Moore ; making, toge-  
ther, fifty-four for Letcher, and sixteen for Moore. Deduct  
these from their respective polls, and the result will be thus :

For Letcher, 3,109	For Moore, 3,115
Deduct, 54	16
3,055	3,099

Giving to Moore a majority over Letcher of forty-four votes. Should the House consider the certificate of the Governor of Kentucky of higher evidence than the copies of the poll books, then five more votes must be added to Mr. Moore, which will make his majority forty-nine. Having thus laid before the House the result of their investigation, the committee recommend the following resolutions :

Mr. Moore de-  
clared entitled  
to the seat.

“ *Resolved*, That Thomas P. Moore, Esq. is entitled to the seat in this House to represent the fifth congressional district of the State of Kentucky.

“ *Resolved*, That Robert P. Letcher, Esq. is entitled to compensation at the rate of eight dollars a day, during the time he has attended, and to eight dollars for every twenty miles travelling.”

A.

*Statement by R. P. Letcher.*

WASHINGTON CITY, March 17, 1834.

To the Hon. NAT. H. CLAIBORNE,

*Chairman of the Committee of Elections :*

Statement by  
Mr. Letcher.

SIR : By an order emanating from the Committee of Elections, on the 9th December last, a call was made upon me to state the grounds upon which I claimed the right to a seat in the Congress of the United States as the Representative of the fifth district of Kentucky, and to set forth also my objections against the claim of the opposing candidate. That call was promptly obeyed. The next morning an answer was delivered to the committee, stating, in substance, that my claim to a seat in Congress rested upon the attested poll books of the five counties composing the fifth congressional district, which showed, conclusively, that I was entitled to the certificate of election, if the sheriffs had performed the duties required of them by law, in making a count of *all* the votes taken in the district on the day of comparing the same. 2d. Because I was elected by a majority of the qualified voters in the district ; objecting, at the same time, to the claim of the opposing candidate, upon the grounds that the certificate exhibited by him in support of his right to a seat, upon its face, was illegal, contradictory, and void, being signed by three sheriffs *only*, when the law required *all*, being five in number ; and showing also upon its face that “ the vote of Lincoln county was not taken into the calculation.”



And, furthermore, because the deputy sheriff of Lincoln county, after meeting the other sheriffs on the day and place designated by law, with the Lincoln poll books in his possession, departed, having refused to suffer the votes of Lincoln county to be counted; which, if counted, would have given me a decided majority of the votes of the district.

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1st Session.

Mr. Letcher's  
statement con-  
tinued.

The same day, it is believed, my answer was handed to the committee, a resolution was adopted, in pursuance of the request of the opposing candidate, allowing a further, but limited time for completing the proof, which had already been commenced in relation to the contest. After the expiration of that period, the testimony having been taken and transmitted to the committee, I was notified by one of them (indeed, an order made to that effect) that it was the wish of the committee each of the contending candidates should be furnished with the papers, first leaving a receipt for the same, and make out an abstract of all the proof taken in the case. Hoping that arrangement might lessen the labors of the committee, and bring the controversy to a more speedy decision, I yielded to their wishes, and proceeded with all imaginable despatch to the performance of the undertaking. Having finished the abstract of the proof taken in all the counties, with the exception of Lincoln, (that having been previously examined, as I had understood, by the committee,) the same was submitted without a single comment on my part. Indeed, as far as I understood the matter, an argument at that stage of the proceedings was not desired. The facts involved in the issue, it was thought, were to be first examined and ascertained, and the argument, if necessary, was to follow afterwards, upon such points as the committee might choose to direct. But it seems a different course is taken, of which, however, I do not complain. I am now informed the gentleman on the other side has sent in his abstract, together with an argument, and that I am permitted to send in one also, if I think proper. A copy of his argument was, by order of the committee, if I understood the matter correctly, to be furnished me, but that order being objected to by the opposing candidate, was reconsidered and rescinded, for reasons, no doubt, in the opinion of the committee, entirely good and sufficient. I have therefore neither seen nor heard the grounds he assumes in his view of the case, for resisting my claim to the seat, or claiming it himself. His right to make an argument upon the whole merits of the case, at any time, and to submit it to the committee, is not contested. My right to know what that argument is, the committee having received it, to see or to hear it, and to answer it, I had thought was equally clear. But as the committee entertain a different view upon this part of the case, it is now proposed to establish, in the briefest possible manner, each of the propositions contained in my communication of 10th December, and to submit such general remarks



1833. upon the law and the facts of the case, as may be deemed  
 23d CONGRESS, applicable to the supposed view taken on the other side.  
 1st Session. 1st. That I was entitled to the certificate of election. It  
 Mr. Letcher's is clearly and conclusively established, by a certified copy  
 statement con- of the poll book of each of the counties composing the fifth  
 tinued. congressional district, that the vote stood thus:

	Letcher.	Moore.
In the county of Mercer, . . . .	686	1,468
In the county of Anderson, . . . .	199	435
In the county of Garrard, . . . .	1,075	247
In the county of Jessamine, . . . .	581	489
In the county of Lincoln, . . . .	650	501

Making the majority, in the whole, in favor of Letcher, 52 votes.

Now the question occurs, How was the result of the election to be ascertained?

A recurrence to the statute of Kentucky, entitled "An act to divide the State into congressional districts," approved 2d February, 1833, will at once settle that question. It is in the following words: (Vide session acts, pages 268 and 269.)

Extract from  
the election  
law of Kentuc-  
ky.

SEC. 3. *And be it further enacted,* That the sheriffs of the several counties in each district shall, on the fifteenth day after the commencement of their elections, assemble at the places hereinafter designated in each of their respective districts, and there, by faithful comparison and addition, ascertain the person elected, in their districts. And that part of the fifth section of said act which bears upon the subject, is in the following words: "After having ascertained, as before directed, the person elected, the sheriffs thereof shall make out a certificate of the election of the person in their district, which shall be signed by all the sheriffs of the district, and which shall be lodged with the sheriff of the county wherein the polls are compared, and by him, together with a copy of the polls, transmitted to the Secretary of State."

The foregoing statute, in plain, strong terms, leaving no room for doubt or difficulty, directs the sheriffs *when, where, and how*, to ascertain who is elected. They have no power, no right, no discretion, under the law, to do, or not to do, what may best accord with their own partialities on the one side, or prejudices on the other. They are messengers, bearing a record of the people's will; trustees of the poll books, directed by law to go to a certain place designated, and there to ascertain who is elected, by making a faithful comparison and addition of the votes, and to make out their certificates accordingly. But the law was not complied with. The duties required of the sheriffs were not performed: they met at the proper time and place; but the deputy sheriff of Lincoln county, Alfred Hocker, refused to

allow the poll books of Lincoln county to be counted, and left the board of sheriffs, taking the same with him, by which I was deprived of the benefit of a majority of 149 votes; which, if counted, would have given the majority in the whole district, in my favor, of the aforesaid number of 52 votes. Most certainly, therefore, I was justly entitled to the certificate of election.

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22d CONGRESS,  
1st Session.

Mr. Letcher's  
statement con-  
tinued.

2d. That I was elected by a majority of the qualified voters of the district.

The establishment of the first proves also the second proposition, which appears equally clear by a reference to the attested poll books, showing the majority to be fifty-two votes. That majority, by casting off all the spurious votes taken on each side, according to the proof before the committee, will show, if I am not very grossly mistaken, an increase in my favor of 60 votes, making the entire majority in the district 112 votes.

3d. That the certificate referred to in the third proposition is illegal, contradictory, and void, and can confer no right to the seat, seems, by a reference to the statute, to be too clear to require any argument.

But objections, it seems, judging from the course of interrogation of the witnesses, have been taken, on the other side, to the regularity of certain parts of the election, which require some general remarks upon the law of Kentucky regulating elections, and upon a few principles which it is supposed the committee will adopt as rules for deciding the main question.

By the act of the 2d December, 1799, the sheriff of each county is the officer who is appointed to advertise the election and to open the polls. He stands alone in the performance of both these duties, and he is under no restraint by law as to the time when he shall begin to perform either of them, except in one particular: he is not to advertise the election *less* than a certain time, nor to open the polls *later* than a certain hour of the day. For the purpose of securing to the people full notice of the time, place, and objects of the election, the law requires the sheriff to advertise them *at least* one month previous to the first Monday in August. He cannot advertise for a shorter time, but a longer time is most certainly within his fair discretion. So also, for the just and legitimate purpose of securing to the people a full opportunity of giving their votes on the days of election, he is to open the polls *by* ten o'clock in the morning, and to continue them open until at least one hour before sunset each day of the election. The terms *by* ten o'clock, mean, most undoubtedly, in the understanding of the law, as well as of men, not *later* than ten o'clock.

They exclude a later hour of opening the polls, unless for unavoidable cause, but not an *earlier*, in the same manner as the terms, "continue the same open until at least one

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1st Session.

Mr. Letcher's  
statement con-  
tinued.

hour before sunset," exclude the closing of the polls at an earlier hour, but not a later. The object of the law is too obvious to admit of a doubt. It is to allow the full time prescribed, and to exclude a less time, but not to exclude a longer time. It is within the sound discretion of the sheriff to open the polls at an earlier hour of the day than ten o'clock, and such, it is believed, is the universal understanding and practice in all the States where similar language is used. It is, to be sure, possible that a sheriff may act *mala fide* in opening the polls before ten; but as it is lawful for him to do so, it is not to be presumed that he does it in any case with a fraudulent intent, unless it be proved; and whenever it is established that the prevalence or fear of a dangerous epidemic, or a desire to give the citizens a more ample opportunity to exercise their rights, has been the motive for the sheriff's act, then not only is the possible presumption of *mala fide* rebutted, but positive proof is given that the exercise of discretion has been precisely what it ought to have been. If the sheriff were to open the polls at an earlier hour, with an improper design, (which is not even pretended to be proved in the case,) it still could not vitiate the election, nor the votes given, because the election would be opened according to law, and the consequences of the act would be lawful. The citizens would have a right to vote, and their votes would be good beyond question, be the motive of the sheriff what it might. If the judges appointed by the county court to conduct the election, or any of them, fail to attend, the sheriff, immediately preceding the election, is authorized to appoint proper persons to act in their *stead*. In the exercise of this power also, the sheriff is without any restraint. As he has authority to open the polls before ten o'clock, the judges appointed are bound to take notice of this authority, and to be in attendance, so as not to obstruct the exercise of it. If any of them fail to attend, when he determines to open the polls, the sheriff is not bound to know or to presume that they will attend at any other time. His power of appointment may consequently be exercised at once, and if made immediately preceding the opening of the polls, whether at ten o'clock or before, it is given in either case. This appointment may also be made *mala fide*, as has been remarked in relation to the opening of the polls; but it is not to be presumed, and, as the act is legal, the contrary is to be presumed; for the exercise of a lawful power is always to be presumed upright and fair.

The substitution of a judge appointed by the sheriff, being on account of the absence of the judge appointed, is not necessarily a revocation of the court's appointment, but an act to remedy the failure of that appointment, or to supply the deficiency, whether occasioned by a refusal or non-attendance at the opening of the polls. The continuance

throughout the whole election of the judge so appointed by the sheriff, even if formally directed, (and the terms of the act are silent upon that point,) is a mere matter of *form* only: substantially, the judge appointed by the court gives all the sanction to the proceedings when he takes his place upon arrival, and the judge appointed by the sheriff leaves his seat, that the law meant to provide. If the judge appointed by the sheriff should die pending the election, or become incapable of going on, or refuse to go on after the election had progressed, the sheriff has not, by the provisions of the act, a power to make another appointment. But suppose either of the contingencies to have occurred, and the sheriff had immediately appointed another judge to supply the defect, would any one doubt, both from the spirit and object of the law, his right to do so? The necessity of the case would require that the rights of voters should be protected against the effect of such a circumstance. The case, however, is still stronger, when the judge appointed by the court takes his place upon his arrival; the whole substance is there, and the form also. The appointment of the sheriff is made on account of the absence of the judge; and from the very nature of the case, and according to the obvious meaning and spirit of the act, it is regarded as an appointment *durante absentia*. But should the most rigid rules of construction be brought to bear upon the case, such as only apply to penal statutes, it would be considered a matter of irregularity merely, and cannot affect the substance of the election. Again: It is alleged that the sheriff of the county of Garrard was absent a short period during the election, and that the vote taken in his absence is illegal and invalid. Let us examine that objection, and see how that matter stands. The authority of the sheriffs and judges over the admission and rejection of votes, after the polls are opened, is not expressly defined by the act of 1799. It must be deduced of course from the nature of the office; but whichever way it be taken, it will result that the temporary absence of the sheriff cannot affect the votes received during his absence. The best interpretation of the third section of the aforesaid act is, that the sheriff has no power whatever over the votes, nor any voice in their admission or rejection; it does not belong to his office. He opens the polls, and is directed or supposed to attend during the election, because he is a high officer of the county, authorized to keep the peace, to ensure the orderly prosecution of the election, and is familiarly acquainted with the people, and can furnish the judges with such information in relation to voters, as it may fairly be presumed he possesses. The *judges* are, by their office, the persons who are to decide on the qualifications of the voters. The act expressly declares that *they* shall attend to the receiving of votes, and not the sheriff.

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The enactment that the persons entitled to vote shall, in

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the presence of said judges and *sheriff*, vote personally and publicly *viva voce*, is, so far as it regards the presence of the sheriff, a mere direction, to give the greater chance of the voter being known by one of them, so that the election may progress with all reasonable despatch, and render the administration of an oath unnecessary: for the clause goes on immediately to make provision for the oath, unless the sheriff shall, or one of the judges shall, know that the party is entitled to suffrage, which shows the object and design of the previous provision. The sheriff, after opening the polls, is to do nothing, if he is present, but to close them at the proper time. His presence, therefore, is not material during all the election, still less is it essential. He is not a *judge*, nor one of the *judges*. But, let it be admitted, for the sake of argument, that he is a judge, and that he, with the other two, constitutes a judicial tribunal, why, then, the universal principle applies, and no technicality, no sophistry, no ingenuity, can get round it, that a majority of every judicial body is a quorum, and the absence of the sheriff cannot prejudice what the two judges agree to in his absence. If he were present every moment, objecting to every voter, and every act of the two judges, his voice would be a nullity. He could neither control, direct, nor overrule their decision. These are the only general remarks which it seems to me necessary to be made upon the act of our Legislature. The great and important principles which ought to be borne in mind, as it seems to me, in the application of the law to the facts of a contested election, are the following:

1. It is the constitutional right of the citizens to choose their representatives. The law does not give them that great right, but the object and only object of the law is to secure it to them. The right of the citizens is above the Legislature; it is a paramount right, existing in the foundation of Government, and without it there is neither constitution nor Government. All laws enacted to secure the enjoyment of this right, should be so interpreted as to effectuate the end. Every interpretation that narrows the right of the citizen, or embarrasses him in the exercise of it, the formal act or ceremony of officers appointed under the law, ought, if possible, to be avoided. The great object of inquiry, in every case of contested elections, is to ascertain whether there has been a full and fair expression of the will of those who have a right to vote, and whether there has been a substantial compliance in time, place, and manner, with the intention of the law.

2. The directory parts of a law regulating elections are not to be regarded as indispensably calling for observance in all its parts, in order to give effect to an election; they would not be so regarded, even if submitted to a judicial decision. The formalities directed to be observed are with a view to secure a full and fair expression of the will of the legal voters.

If this is shown to have been expressed, even a judicial tribunal would give effect to it, notwithstanding the formalities directed by the law had not been complied with. The question would be, whether they had been substantially complied with; so complied with as to furnish the requisite evidence that the election was fair and full, and by the qualified voters. If this was shown, even a judicial tribunal, proceeding upon the principles which govern such tribunals, would hold the informalities to be wholly immaterial.

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3. But the power of the legislative body is upon this point vastly larger than that of the judiciary. Of the elections, returns, and qualifications of its own members, each House is the uncontrollable judge. And it has been so ordered by the constitution, to place it above the influence of all form, and of all abuse or disregard of form, to the injury of the elective franchise. The petition to the House, to oust the returned member, and to give the seat to another, is, in every case, an appeal to the House to reverse both the judgment of the judges of election, and the formal return required by law as evidence of election. That which is in general indispensable matter of evidence, prescribed by law to show the result of an election, is regularly and habitually disregarded, whenever it refers the subject of a disputed election to the Committee of Elections. The House will not respect any form whatever, and such has been its uniform course of action, if the substance of a free, full, and fair election is shown to be defeated by them. The question is, in all such cases, Who ought to have been returned? Whom did a majority of the qualified voters elect? And forms should be made subservient to this inquiry, and not to lead and to rule in opposition to substance. If it is adopted by the House as a principle, that the absence of the sheriff for a short period of the time of the election (even if his presence is supposed to be directed by law) shall vitiate what is done in his absence, or that the opening of the polls at too early an hour, or the substitution of a judge, or his giving place to the judge appointed by the court, when he afterwards appears, instead of going through the whole election, shall destroy the validity of all that has been done during the existence of such supposed irregularities, every principle heretofore recognised by the House, in cases of this sort, must be disregarded and reversed, and the power of the House to judge of the elections of its members will be annulled. They will not only admit, but declare that the act or omission of a sheriff, the act or omission of a judge, accident, forgetfulness, ignorance, design, may all; or any of them, bind and oblige the House to decide the question contrary to the rights of a majority, and to constitutional justice. On the contrary, the House is free from the control of all such circumstances. They are bound to regard nothing as under all circumstances indispensable, but the qualifications of the voter, which are fun-



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**Mr. Letcher's statement continued.** Forms are material or immaterial, so as they promote the fair exercise of the elective franchise ; and so far as they are material, they may be insisted upon ; but in no case do they legally oblige and bind the House ; and in no case can the want of any of them vitiate an election that is shown to have been full and fair.

4. The utmost effect that an irregularity ought to produce, is in the way of evidence, by raising a possible presumption against the validity of what has been done during the existence of the irregularity, until it has been shown to have been substantially right. If, for instance, the constant presence of the sheriff is material to secure a free and fair election, the effect of his absence would go no further with the House, or the committee, than to raise a presumption against the votes taken in his absence, until they were shown to be good. This is intended as an illustration of the principle. If the formality required be wholly immaterial and unsubstantial, the omission of it will have no effect. If it is material, as tending to secure the freedom and fairness of election, the omission of it may raise a presumption against such acts as had not the sanction of the form, but the omission in point of effect goes no further ; and when the informal acts are sustained by evidence, the omission ceases to have any possible effect whatever.

5. The House has acted upon this principle so repeatedly, and in so striking a manner, as to give it the force of settled law in relation to elections. The committee are no doubt familiar with most of the cases decided, and their attention, therefore, will only be drawn to one or two cases, in which the principle is strongly, clearly, and conclusively established.

In the case of the contested election of Pryor Lea, (Rep. 11, 32, 21st Cong. 1st sess.) it was proved, and so set forth in the report of the committee, that the law of Tennessee expressly enjoined the following formalities, all of which were material to the fairness of election :

1. That, at the close of each day of election, the returning officer (the sheriff) should, in the presence of the inspectors, put his seal on the place (the opening in the box) to be made for the reception of the tickets, which should continue until the election should be renewed the succeeding day.

2. That it should be the duty of the inspectors to take charge of the box until the polls were opened the next day, and the seal should be then taken off in the presence of the inspectors. The facts in evidence before the committee, and so reported, were, 1st, That in one precinct the ballot box was not left in charge of the inspectors, but left with the sheriff, who had previously sworn he would keep it, who, with the approbation of the inspectors, locked it up in a trunk,

of which the sheriff kept the key—the trunk being in a small storeroom, of which one of the proprietors kept the key; that, in another precinct, instead of a ballot box, a *gourd* was used, and not sealed at all by the sheriff, but stopped up, and tied in a handkerchief, and left with one of the inspectors. The committee decided that these, and many other irregularities specified in the report, should have no effect, believing the election in the main had been fairly and honestly conducted. The same principle was also adopted by the House in the case of Mallary, 1st session 16th Congress, where there was a clear and admitted disregard of the forms prescribed by the law of Vermont, in consequence of which the canvassing committee rejected the returns. The committee say in their report: “It is sufficiently proved that in Fairhaven, Plymouth, Woodbury, and Goshen, the votes were given according to law, and certificates thereof were duly recorded in the town clerk’s office of the several towns. But, the presiding officer of the election in Fairhaven did not, as the law directs, seal up the certificate of votes after it had been recorded in the clerk’s office, but sent it unsealed to the canvassing committee; for this cause it was by them rejected. No fraud is alleged, nor has the mistake done any injury to the sitting member. The town clerk’s record is doubtless designed to guard against fraud; and it has not been the practice of the House of Representatives to allow votes legally given, to be defeated by the mistake or negligence of a returning officer, especially in mere matter of form. The committee are of opinion that the votes of this town ought to be allowed to the petitioner.”

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There are several other irregularities of the same kind noticed in the same report, and by the committee and the House held to be immaterial.

The preceding remarks will now be applied to several objections believed to be taken to certain parts of the election by the opposing candidate.

1. The absence of General Kennedy, the high sheriff of Garrard, on the second day of the election. The absence of this officer occurred between ten and eleven o’clock the second morning of the election, and was occasioned by the sudden and violent illness of his wife, of which she afterwards died. The deputy sheriff, Yantis, who had mostly cried the votes on the preceding day, was permitted by the high sheriff to go to the country, under the engagement and promise of the high sheriff to perform that duty himself the next day; and when the illness of the high sheriff’s family made it necessary for him to leave the polls, the deputy could not immediately be reached. The high sheriff went, with the assent of the judges. The votes in his absence were cried by James Spillman, who had formerly been sheriff of the county, and well acquainted with the voters; and after four or five votes were given, (and the votes on that morning

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were given very slowly,) his place was supplied by Isaac Marksbury, with the approbation of the judges, who cried the votes until about twelve o'clock, when Yantis, the deputy sheriff, returned. The number of votes given whilst Marksbury cried them, before the arrival of Yantis, was *forty* or *forty-one*; fifteen or sixteen of which, he, Marksbury, the witness of the contending candidate, proves were given to him. That at the time the aforesaid votes were given, the friends of Major Moore were in attendance, and carefully scrutinized the same, and seemed satisfied. There is the strongest evidence that all the votes received during the time were qualified voters, with one exception, and he voted for the opposing candidate. Indeed, the proof upon this point stands uncontradicted. The answer, therefore, to this objection, is, that the presence of the sheriff is not indispensable; that his absence was occasioned by a necessity of the strongest and most imperious character. That it was with the assent of the judges; and that no vote given in his absence has been doubted, questioned, or impeached, with the exception of William Kinder, who, as stated before, voted for the opposing candidate.

2. As to the opening of the polls of Garrard county on the first day before ten o'clock, and the appointment of a judge by the sheriff.

The cholera had raged in Lancaster, in June and July; the people of the country were alarmed; and it was apprehended that a crowd might reproduce it. The early hour of opening the polls was intended to accommodate the voters, and it is not even pretended that any one was injured by it. The motive was not only just and proper, but highly laudable.

Marksbury, one of the judges, having become a candidate for the Legislature, refused to serve, and Landrum was appointed in his place. Wheeler, the other judge, not having arrived, the high sheriff appointed Grant in his place, who would not consent to serve longer than until Wheeler arrived, and therefore was appointed during his absence; and when Wheeler arrived, only a few votes having been taken, as proved by the high sheriff, he took his seat, and continued to act throughout the election. All the votes taken whilst Grant acted as one of the judges, which was about half an hour, are proved to be good and legal; not a single one has been doubted or impeached. The whole number taken within that time, Marksbury believes to be about twenty or thirty. The answer, therefore, to this objection, is, the sheriff had the right to open the poll before ten o'clock. That the circumstances under which he did it, made it entirely proper for him to exercise that right. That the appointment of Grant was to continue until Wheeler should come. That, during the whole time, qualified judges were present, and that the votes received were those, and no others, of quali-

fied voters. Now, with all these facts clearly proved standing uncontradicted, by what authority can these voters be deprived of their right of suffrage? by what rule of evidence, of law, or of justice, can the honorable committee or the House, strike their names from the record? But suppose they were to be stricken off, how would the matter stand then? The number of votes given in the absence of both the sheriffs on Tuesday morning of the election, has already been shown to be forty or forty-one; of which number, the opposing candidate received fifteen or sixteen, which would leave a majority in my favor, of the entire vote given in the aforesaid period, of eight or nine. Again: Suppose every vote received whilst Grant presided as one of the judges, amounting to the highest number of thirty, as stated by Marksbury, and suppose the whole number given were in my favor, and not one of the thirty was given to the other candidate, which is not the fact, as appears by a reference to an attested copy of the poll books, still my election is proved beyond all question. The majority in my favor, as appears by reference to the poll books, is fifty-two. That majority is greatly increased, when the spurious votes are cast off on each side, which is already stated. In deciding upon those votes, it is immaterial whether the committee adopt strict or liberal rules of evidence; the result, in effect, will be the same, if the rules be uniform.

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3. And an objection has also been taken to the regularity of the Garrard election, upon the alleged absence of the judges from the polls. To support this charge, H. Wortham, a witness in behalf of the opposing candidate, states he heard the vote of Henry Smith, the fourth, on the third morning of the election, cried, while Landrum, one of the judges, was absent from his seat, and walking towards the court-house; that he took his seat before Smith left the door: witness does not know that Landrum had taken his seat that morning before, nor does he know who cried the vote that morning. In answer to that, Daniel Foster states that he was the first man that voted at Lancaster on the third morning of the election.

Messrs. Landrum and Wheeler were both present, the first in his seat, and the other standing by; that all the officers of the election were present; that four other votes were taken at the same time, and, as it was quite early, the judges took a recess of some fifteen minutes. Burdett Swope also, on the same side, says he voted on the last day, soon after the polls were opened; not more than two or three votes had been taken. Landrum, Wheeler, and the sheriff, all present; he had a conversation with Landrum about a coat. An abstract of the testimony, carefully made out, classified, and arranged under proper heads, with references to packet and page of the depositions, has long since been before the committee, by which they can, without difficulty, turn

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to the proof upon this, and every other point, and it cannot, therefore, be necessary now to repeat it.

It is proved, by the friends on both sides, that the officers of the election are men of unblemished reputation, and of strict integrity; that they were particular and vigilant in the discharge of their duties. Major A. J. Brown says he was one of Moore's friends in Garrard, selected to watch the polls and keep off bad votes; has said, on different occasions, before he went to Harrodsburg, (where the sheriffs met to compare the polls,) that he never saw an election more fairly conducted in the county. He deserted his post only when he went to bring up small squads to vote. He has always considered the officers appointed to hold the election in the county, high-minded, honorable men; he can make no exception. His opinion, that the election was fairly conducted, was formed from the knowledge he had at the time. Such is the opinion also of a host of witnesses, whose testimony is before the committee.

4. It is again objected that the judges of Garrard acted illegally, if not corruptly, in allowing John Brady to change his vote, having given it to the opposing candidate the first day of the election, and to Letcher the third day of the election. A brief examination of the facts will explain and settle this objection, and will show that the conduct of the judges upon the occasion was not only fair and correct, but such as was demanded of them from the nature of their duties. Here is the proof upon the subject:

John S. Salter, a gentleman of high character, of integrity, and veracity, so proved to be by the united and undivided testimony on both sides, states he was present when Mr. Brady came up to vote. Samuel Jackman came up with him near the polls, and motioned to Brady to go up and vote. The sheriff said, "come up, Mr. Brady, and vote." When Jackman motioned to him again to go up and vote. Brady went up and voted for Moore, and before witness left the door where the votes were taken; and in a few minutes after he voted, Brady came back, and told the judges he had voted through a *mistake*, and asked them if he would be permitted to have it *scratched off*. Witness thinks Yantis, the sheriff, said they could not do it. Brady insisted it should be taken off, as he had voted *through a mistake*. The officers of the election had a short conversation among themselves upon the subject, as witness supposed, and then observed they would think on the subject. The officers seemed disposed to do what they thought right on the occasion. The voter, Brady, had not retired from the polls before he requested to have his vote changed, and that he was not farther off than witness was, about ten feet. Witness does not believe that any one spoke to voter before he applied to have his vote scratched off. He saw no attempt made to influence him. Witness's attention was drawn to the voter by Jackman's nodding, and



the sheriff's telling him to come up and vote. It seems, from the evidence, that the voter, before he retired from the polls, without being spoken to by any body, uninfluenced in any way whatever, and freely and of his own accord, returned, and demanded to have his vote changed, alleging he had voted through mistake. The judges hesitated whether they would allow him to correct that mistake; they acted cautiously, took time, after consultation, for further deliberation and advisement, and finally decided the voter had a right to correct his mistake. Now the question is, was that decision so outrageous as to furnish evidence of corruption and partiality on the part of the judges, or was it such a decision as they were bound to make? A voter is a freeman; he comes to the polls to exercise his privilege of voting according to his own will. From carelessness, accident, or inattention, or any other cause, he gives his vote not according to his wishes. He instantly makes known his mistake. He recalls the act, he demands its correction, he insists upon his right to vote the way his inclination leads him. Is he bound by that mistake? Is there no power to correct it? Should such be the case, the vote would be counted in favor of one candidate, when the *will* of the voter was for another. It would be virtually compelling a man to vote against his own feelings, his wishes, his judgment, and his choice.

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It would be holding him down to a *mistake*, contrary to every well-established principle governing all the actions of men throughout life. The universal principle, and such is believed to be the practice also, is to allow the correction of mistakes when made known under proper circumstances. Such is every day's practice both in the Senate and House of Representatives. A gentleman votes on one side of a question from inattention, from misapprehension, by mistake; his wish is made known to change his vote, and no one hesitates to allow him to correct that mistake.

5. The judges of the county of Garrard are charged with acting corruptly in taking the vote of Benjamin Gresham. The evidence upon that subject, in substance, is this: Gresham was confined to his sick bed; he lived in the town of Lancaster, about one hundred yards from the court-house; is an orderly, pious, worthy citizen, was anxious to vote, sent repeated messages to the judges to know if they would wait upon him, confined as he was, and take his vote; said it had been allowed to a sick man some years before by other judges, and he claimed the same privilege; the judges waited upon him the third morning of the election, and received his vote without prejudicing the rights of any other voter. In thus receiving his vote, they were governed by precedent; other judges, upon a previous occasion, and under like circumstances, had taken the vote of Gelon Hann, and no objection having ever been heard against that decision, the judges had a right to consider it as a settled question.



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6. Another objection raised is, that one of the judges of the election, Lewis Landrum, married a connexion of my wife, and that the clerk of the election was my nephew. Who any of the officers married, or are akin to, can never form a matter of grave inquiry and discussion, it is believed, on the part of the committee. The question is not who they married, who they are related to, but whether they acted honestly, fairly, and justly, in the discharge of the public trust confided to them. But say, for example, the connexion of some of the officers of election to a candidate creates a presumption of fraudulent management on their part, (an admission which can never be seriously made,) that presumption is at once destroyed if it be shown that they have acted fairly and impartially throughout the election. Now refer to the proof. In the first place, the officers support an unspotted reputation for fairness and uprightness; the clerk is the same who had acted as such, under the appointment of the court, during several previous years. Their conduct throughout the election is proved, as the witnesses believe, to have been fair and impartial. It is not pretended that any vote was placed upon the poll against the will of the voter; it is not proved, or pretended to be proved, that the poll books were kept dishonestly, or inaccurately; it is not pretended to be shown that the judges refused to allow any voter his privilege of voting, when he had the right to vote; on the contrary, one of the leading friends of the opposing candidate, who was selected to watch the polls in Garrard, Major A. J. Brown, states that he never saw an election conducted more fairly, and that he knows no vote not correctly set down by the officers of the election as given. Again: Another fact appears in support of the honesty and impartiality of the officers of the election, which places the matter beyond all dispute. The poll books of Garrard have been searched, examined, and scrutinized for months after the election, and every vote inquired into with a vigilance and industry rarely if ever known in any case. It is in proof that shortly after the election a list of all the votes given to me, in the aforesaid county, was made out, and placed in the hands of persons who were actively engaged in hunting out all bad votes. Now look at the result. The opposing candidate, if I am not greatly deceived in the proof, received as great, if not a greater number of spurious votes in that county, in proportion to the aggregate amount given to him; than was given to me. The number, however, on the whole, is inconsiderable. But let us look a little further into the doctrine of relationships creating a presumption of fraud, and see how it operates. It is proved, on the other side, that some of the officers of the election at Salvisa, in the county of Mercer, were connected to the opposing candidate. The rule then must, if applicable in one case, be applied also in the other case. But the propriety and justice of the application of any such rule are

wholly discarded on my part as applicable in either case. The belief is, an honest man, whether he be connected to A, B, or C, will always act as such in any situation you may place him.

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In conclusion, I beg leave most respectfully to repeat that I am wholly indifferent as to the rules of evidence the committee may choose to adopt in deciding upon the legality of votes assailed as spurious, on both sides, believing, as I confidently do, my majority cannot be diminished in any event by a just and uniform application of those rules, whatever they may be.

I have the honor to be, your obedient servant,

R. P. LETCHER.

B.

STATEMENT BY T. P. MOORE.

*To the Committee of Elections of the House of Representatives of the United States :*

GENTLEMEN : To facilitate your investigations, I proceed to lay before you, in as condensed a form as the importance of the subject will permit, the facts, the principles, and the law, upon which I claim to be the rightful member of the House of Representatives from the fifth congressional district of Kentucky. In doing so I shall dwell as little as possible on those extraneous considerations having nothing to do with the right of the case, which have been dragged in out of doors to prejudice the public mind, if not to influence the decision of this committee and of the House of Representatives. Those matters I have met and shall meet in the proper manner before the proper tribunal ; but here I have no concern but with the evidence which is before the committee, upon which alone their decision is to be made up.

By reference to the depositions taken in Garrard county, it will be perceived that every justice of the peace in that county, the sheriff and his deputies, and every constable, save one, were opposed to my election. As the judges of the election must by law be taken from the justices of the peace, I had of course no cause to complain that none of my political friends were selected to act in that capacity ; but that very circumstance created a just claim, on my part, that the clerks to the election should be taken from among my supporters: Not only was that claim disregarded, but, in the ultimate selection of the officers of the election at Lancaster, the seat of justice in Garrard county, the positive wrong was done me of assigning to that duty the connexions and relations of Mr. Letcher, thereby adding family predilection to political bias.

The high sheriff himself was connected with that family by the marriage of a daughter to a nephew of Mr. Letcher.

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*Lewis Landrum, Esq.*, one of the judges of election, appointed by the high sheriff, married a niece of Mr. Letcher's wife.

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*Moses Grant, Esq.*, who was also appointed by the high sheriff to act temporarily as a judge, married a niece of Mr. Letcher.

*Alexander McKee*, the clerk of the election, appointed by the county court, was a nephew of Mr. Letcher.

The high sheriff acted the first and last day of the election, Messrs. Landrum and McKee during the whole election, and Mr. Grant only for a short period during the first day.

So far, therefore, as political, personal, and family feeling can bias the minds of men, I had every disadvantage to encounter at the Garrard polls.

In the very first step of the election, the provisions in the laws of Kentucky regulating elections were clearly disregarded. The second section of the act of December 21, 1799, regulating elections, (Digest, vol. 1, page 451,) provides that the justices of the county court at their court next preceding the election shall appoint two of their own body as judges of the election, and also a clerk, with the following proviso, viz.

"In case the county court shall fail to make said appointments, or the persons appointed, or any of them, fail to attend, the sheriff shall, immediately preceding the election, appoint proper persons to act in their stead."

It is provided in the first section of the same act, that "the sheriff or other presiding officer shall, on the day of every election, open the poll by ten o'clock in the morning," &c.

In the third section, it is provided that

"The judges of the election and clerk, before they proceed to the execution of their duty, shall take the oath prescribed by the constitution, which may be administered by any justice of the peace. They shall attend to the receiving the votes, until the election is completed, and a fair statement make of the whole amount thereof," &c.

It will be perceived that, if the county court appoint judges, it is only in the case of their *failure to attend*, that the sheriff has any lawful right to appoint others to act in their places.

The county court of Garrard county had appointed Isaac Marksbury and William Wheeler, Esquires, judges of the election. Mr. Marksbury declined acting, and Lewis Landrum was appointed by the sheriff to supply his place. But did Mr. Wheeler "*fail to attend*," so as to authorize the high sheriff to make a new appointment?

*Failure to attend* must have reference to *some particular time*. That time may be assumed to be the point when the polls are *usually opened according to law*. The law mentions the hour of "*ten o'clock in the morning*" as the time *by which* the sheriff shall open the polls. If, therefore, the

judge appears by ten o'clock, he *does not fail to attend*, and no power vests in the sheriff to appoint a substitute.

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It may be said that the law does not prohibit the opening the polls before ten o'clock, and that the sheriff may, therefore, open them at any previous hour in the morning. Will it be pretended that he may, to subserve the ends of a party, or favor a particular candidate, without giving notice to the judges and clerk duly appointed by the county court, go to the court-house by daylight, put on the bench the relations of his favorite candidate, under pretence that the regular judges and clerk had failed to attend, and proceed with the election? Such a course would be conceded on all hands to be a gross violation of the law. Yet, if he can put up his creatures, and proceed with the election one hour before the usual time, he can six, or even ten. The night from twelve o'clock may be occupied by the sheriff and his friends, without the knowledge of the regular judges and clerk, in recording votes for his favorite candidate. By *failure to attend*, the law must mean a *failure* at the *usual and lawful time of opening the polls*; and unless the regular judges and clerk are in attendance, the sheriff cannot open the polls before ten o'clock, because he cannot know until then whether they will fail to attend or not. But we are not left to conjecture as to the views entertained by the high sheriff of Garrard on this very point. The honorable William Ouseley, late a judge of the court of appeals, in Kentucky, makes the following statement in his deposition, viz.

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tinued.

"At the election of this county for Representatives to the State Legislature, in August, 1831, General Kennedy and myself were both candidates. General Kennedy then protested against opening the polls until ten o'clock, and they were not opened until that hour."

This is the same General Kennedy who was high sheriff at the recent election, and this incident, as well as other testimony, proves that ten o'clock is considered the legal time for opening the polls in that county, and that General Kennedy himself supposed that his right as a candidate might be violated by opening them sooner. In addition to the law then, we have the understanding and usage in Garrard county on this subject fully established.

In the same deposition, Judge Ouseley states, and it is proved by many others, that "the polls were opened at Lancaster on the first day of the election *before nine o'clock in the morning*. It was," says he, "*earlier than the polls are usually opened*."

Mr. Wheeler, therefore, the judge appointed by the county court, *had not failed to attend*, because the legal and usual hour for opening the polls had not arrived. The contingency on which *alone* the sheriff was authorized to appoint a substitute, had not happened. The appointment of Grant before nine o'clock was illegal and void.

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tinued.

The case is made stronger by the fact that Wheeler *actually did attend at the legal and usual time*. Judge Ouseley says he saw Mr. Wheeler ride into town "*before ten o'clock, or about that time.*"

Major A. J. Brown says, "Esquire Wheeler passed his house, two miles from Lancaster, about nine o'clock, on the first day of election. The usual time for opening the polls had been about ten o'clock."

The contingency, therefore, which *alone* could authorize the appointment by the sheriff, *had not occurred when he made the appointment*, and *never did occur*. Mr. Wheeler did not "*fail to attend*," and Mr. Grant never was a legal judge of the election.

Mr. Grant was admonished at the time not to open the polls.

Simeon Anderson, Esq., who voted for Mr. Letcher, testifies that he had a conversation with Mr. Grant, and "advised him not to have the polls opened until ten o'clock, the usual hour"—"that Wheeler would certainly arrive in time," &c.

It was of no avail. The convenience of a few of Mr. Letcher's friends, or some other consideration, induced the sheriff to assume an illegal power, appoint a judge before he knew whether the regular judge would fail to attend or not, and the polls were opened before nine o'clock.

From these considerations, I think it is clear that, until the arrival of Mr. Wheeler, there was but one judge of the election, if any, (for the legality of Landrum's appointment before ten o'clock might be questioned,) the appointment of Grant being void, and that all votes given while Grant was acting as judge, were illegally taken, and ought to be struck out of the Garrard poll.

But if it shall be deemed that the appointment of Grant was legal, which I cannot conceive, then I maintain that according to law he ought to have acted throughout the election, and that the subsequent assumption of that duty by Mr. Wheeler was illegal. It will be observed that there cannot, by law, be *two acts of judges*, one appointed by the county court, and another by the sheriff. Those appointed by the county court must be considered in office until the time for opening the polls arrives, unless they may have previously declined to act, and then their places may be vacated by *failure to attend*. The sheriff then proceeds, "*immediately preceding the election*," to fill up the vacancy, not for an hour, or a day, but for *the whole election*. He has not the power to make a *temporary* appointment. The words of the law evidently contemplate that the bench of judges shall be filled up, and *for the election*, before the polls shall be opened. The law says, "in case the county court shall fail to make said appointments, or the persons appointed, or any of them, fail to attend, the sheriff shall, *immediately pre-*

ceding any election, appoint proper persons to act in their stead." The very next section, after providing that they shall be sworn, proceeds to say, "They shall attend to receiving the votes *until the election is completed*, and a fair statement make of the whole amount thereof." Now, did Mr. Grant, after being sworn, (if sworn he was,) "attend to receiving the votes *until the election was completed*?" If he was legally appointed, that was his express duty according to law. Mr. Wheeler had vacated his appointment by failing to attend, and he could not come in at a subsequent period of the election, and take the business out of the hands of Mr. Grant. The latter, if lawfully appointed, was clearly in for the election; it was his duty to see it through, and "*a fair statement make of the whole amount thereof*." But, instead of that, he attends to receiving votes only an hour; Mr. Wheeler, who was out of office by failing to attend, comes in, even without any new appointment; he assumes to act as a judge throughout the election, and in the end makes out "a statement," not of his own work only, but of Mr. Grant's also. The committee will perceive that the *whole* poll, as well the votes taken while Mr. Grant was acting, as those taken by Mr. Wheeler, is certified by Wheeler.

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tinued.

"The persons entitled to suffrage (says the law) shall, in the presence of said judges and sheriff, vote personally and publicly *viva voce*."

The proof that they have so voted is the "fair statement" and certificate made out by the judges and sheriff at the close of the polls. But how did Mr. Wheeler know that those who voted before he took his seat, voted in the presence of *any* judges and sheriff, *personally, publicly*, or *viva voce*? By what warrant does he certify another man's work, not even done in his presence? How could he officially know or certify any thing about that portion of the poll book which was made up before he took his seat? It is clear that his certificate or statement can be of no use in reference to the votes taken by Grant; and those votes are not witnessed as the law requires. If Grant was a legal judge, then he should have certified to the votes taken by him; and if Wheeler was a legal judge, he should have confined his certificate to the votes taken by him. The absurdity of one man's certifying under oath to the work of another, and the fact that no mode has yet been devised by which more than one set of judges can certify to the same poll, or different parts of it, seem to be conclusive that it is the intention of the law, as well as the practice under it, that when a judge once commences, he must "attend to the receiving the votes *until the election is completed*."

It cannot be tolerated for a moment that the sheriff shall, by construction, assume the power to put up whom he pleases as judges and clerk of the election, one, two, or six



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hours before the usual time for opening the polls, on either or every day of the election, to be superseded at ten o'clock by the regular judges and clerk, and that these shall certify votes which they did not take. Not only the words of the law would be violated, but there would be neither propriety nor safety in vesting the sheriff with such a power.

It seems clear, therefore, that if Grant was lawfully appointed judge by the sheriff, he was judge for the whole election; and Wheeler, having vacated his appointment by failing to attend, had no more authority to act than any other citizen; and all acts done by him, as judge of the election, are void. The whole Lancaster poll after ten o'clock on the first day must, in that event, be rejected, there having been, after that hour, but one legal judge of the election.

But inasmuch as Wheeler did attend at the usual time for opening the polls, I insist that Grant's appointment was void, and Wheeler's acts, except the certificate, regular and valid. When the polls open at the commencement of a Kentucky election, the voting is generally very rapid, and sometimes 150 votes are taken in an hour. There are no means of ascertaining the precise number taken during the hour that Grant was acting as judge; for it will be perceived there is not the slightest mark on the poll book to show that he ever acted at all, the whole appearing as if Wheeler had acted from the commencement. John Boyle, however, testifies that he voted before ten o'clock; and that Grant was then acting as judge. By the poll book it appears that, including his vote, there had then been given *seventy-two* votes to Mr. Letcher, and *eleven* to me. These I claim to have struck off, on two grounds:

1. They were not taken by persons authorized by law to hold an election, one of the judges, if not both, having been appointed by the sheriff, without authority by law.

2. They are not certified to by the judges by whom they were taken; and, so far as regards them, the certificate annexed to the poll book is null and void.

It is very doubtful whether Mr. Grant or Mr. Landrum was sworn according to law. General Kennedy says in his deposition, that "he believes Hugh McKee, a justice of the peace for the county, swore them, but he did not hear the oath, although he was satisfied they were sworn." If the General is not in error in another part of his deposition, they could not have been sworn by Hugh McKee, or any other justice of Garrard county, unless by each other. He says that "on the morning of the first day he called on Mr. Landrum to act, *there being no other justice of the peace in the town, except Mr. Grant*, and he reluctantly consented." And Mr. Marksburg says, "there was no other that could be appointed at that time." Now, if there were no other justices of the peace in town but Landrum and Grant, Hugh McKee could not have been there to swear them. But I

shall not dwell upon this point, although my own conviction is that they never were sworn.

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*Jessa Yantis, Esq.* was the deputy of General Kennedy, the high sheriff, and they attended the polls alternately, during most of the day on Monday. Yantis, the high sheriff, judges, and clerk, were warm partisans of Letcher. Not content with the performance of his official duties, it appears that, on Monday evening, Mr. Yantis rode out into the country for the sole purpose of inducing the friends of Letcher to come to the polls on Tuesday and Wednesday.

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tinued.

*Mr. Marksbury* states that he heard Mr. Yantis intended to go and bring in some votes for Letcher, and knew the place where he was going was the upper end of the county, twelve or fifteen miles off.

*Judge Ouseley* states that he understood from Mr. Yantis that he and Mr. George McKee, cousin to the clerk, were, on Monday evening and Tuesday morning, "*absent in the upper end of the county, endeavoring to get votes for Mr. Letcher.*"

There is other evidence to the same effect; but this is the most direct. It is alleged by some that his business was to allay the apprehensions of the people, which had been excited by false rumors of the prevalence of the cholera in town; but if there be any ground for such an assertion, it was yet for Mr. Letcher's benefit and my injury, as much as if he had gone out with a carriage, and brought in the sick and lame to vote for Mr. Letcher. The sole object was avowed to Judge Ouseley—it was to get in voters for Mr. Letcher, and not voters for me.

On Tuesday morning, after the polls were opened, and while Mr. Yantis was still gone on this business, the high sheriff was sent for, his wife being suddenly taken ill. Yantis being out for the purpose of rallying voters for Mr. Letcher, there was no deputy sheriff to take the high sheriff's place. Although the law makes the sheriff or deputy "*the presiding officer*" of the election, and declares that "*the persons entitled to suffrage shall, in the presence of said judges and sheriff, vote personally, publicly, and viva voce,*" yet the managers of the Garrard election found no difficulty in dispensing with a sheriff altogether!

*General Kennedy* himself says he called on James H. Spillman, who had acted as sheriff or deputy two years before his time of service commenced, and requested him to cry the votes till Mr. Yantis came in.

*James H. Spillman* states that he was not sworn, and cried but four or five votes, when either he or the judges told Mr. Marksbury if he came into the court-house he must cry the votes; which he consented to do, and came in. Marksbury was not sworn in his presence. He thinks it was between ten and eleven o'clock when he began to cry the votes, and had heard General Kennedy cry only one or two before he took his place.

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statement con-  
tinued.

*Isaac Marksbury* states that he came in town on the second day of the election, from Judge Ouseley's, and that the high sheriff was then gone; that, by permission of the judges, he cried about forty votes, fifteen or sixteen of which were given to Moore, and the balance to Letcher: that he cried in all sixty or seventy votes, but a portion of them were taken while Mr. Yantis was present; after Yantis came, he cried awhile, and then "requested witness to cry, complaining of being unwell, and laid down, with his head on a saddle or saddlebags." Yantis came in before dinner.

*Stimson Anderson, Esq.* says, that although frequently at the polls, he "did not see Mr. Yantis until about one o'clock of that day."

*Horatio Bruce* states that he was informed by I. Marksbury, that, in consequence of there being no sheriff, he, Mr. Marksbury, cried the votes and acted as sheriff, without being qualified as such, while he supposed seventy or eighty votes were taken."

From this evidence, it appears that all the votes, except two, given on Tuesday, between ten and one o'clock, or thereabouts, were taken in the absence of the sheriff. It is difficult to believe that but forty-seven votes were given in three hours' voting; but take the statements of Mr. Spillman and Mr. Marksbury as correct. Two votes appear to have been received in the presence of the sheriff, and of the succeeding forty-five taken in his absence, twenty-nine are for Mr. Letcher, and sixteen for myself, as appears by the poll book. These votes not being taken "in the presence of the judges and sheriff," as the law expressly requires; but in the absence of the sheriff, and by presiding officers, who, without a sheriff, had no right to hold an election, I claim to have stricken from the poll.

I might, without impropriety, press this point further, and insist that the whole seventy or eighty votes cried by Mr. Marksbury, a part of them while Yantis was lying down with "his head on a saddle or saddlebags," should be struck from the poll. They could hardly be said to be taken in the presence of the sheriff. Here is a presiding officer of the election, who goes out, spends a part of two days and a night in rallying votes for my competitor, comes in sick with fatigue and want of sleep, is unable to attend to his duties, lies down with his head on his saddle or saddlebags somewhere in the court-house; and doubtless takes a nap. Could he be considered *present* in law? If the two judges and sheriff were to lie down in the court-house and go to sleep, would the clerk be authorized to proceed with the election, and could it be certified with legal truth that the votes were given *in the presence* of the judges and sheriff? Such a *presence* cannot be that intended by the law; and Mr. Yantis might as well have been hunting voters in the upper end of the county fifteen miles off, as lying down in the court-house with his

head on a saddle, so far as it regards the legality of the election thus conducted.

Not only did a presiding officer of the election travel out to hunt up votes for Mr. Letcher, but in one instance at least the judges also *travelled out to take them*!

*A. J. Brown* states that Mr. Wheeler, one of the judges, told him that they left the sheriff and clerk with the books at the court-house; went to the house of Benjamin Gresham, and there took his vote for Mr. Letcher.

*Benjamin Gresham* himself states that, at his request, the two judges called at his house the last day of the election, and took his vote.

The excuse for this extraordinary proceeding was, that Mr. Gresham was sick, and the same thing had been done once before. It was not pretended that there was legality or propriety in it. The law requires the time and place of holding elections to be advertised by the sheriff at least one month previous thereto, and it has never been imagined that elections could be held by the same judges and sheriff at more than one place at the same time. Besides, the place is always the court-house, if there be one, and if not, at such house as is specially designated by law. It is, however, sufficient in this case to observe that the law requires the votes to be given in the presence of the judges and sheriff, "personally, publicly, and *viva voce*," whereas Mr. Gresham's vote was given *privately*, in the presence of *the judges only*, and not at the legal place of voting.

There are other evidences of an entire forgetfulness of the law on the part of the officers of the Garrard election.

*S. Woods* states that, after he voted on the second day of the election, Mr. Wheeler, one of the judges, came out of the court-house and talked with him from a quarter to half an hour, and then went from the court-house, and that he heard votes cried at the door while they were talking together. These votes could not have been given *in the presence* of Mr. Wheeler.

*H. Wortham* states that on the last day he heard the vote of Henry Smith announced when one of the judges was not in his seat, but was approaching the court-house, and took his seat before Smith left the door. Smith's vote is the fourth recorded on the poll book for the last day of the election, whence it is evident that the four first votes on that day were not taken *in presence* of the judges as required by law.

*W. Bryant* states that he voted on Monday evening about four o'clock, and that no sheriff was present. He saw Mr. Yantis a few rods from the court-house, leaving it, and Mr. McKee, the clerk, cried his vote. It was not, therefore, taken *in the presence* of the sheriff.

*Wm. Kinder*, when he voted, saw no man acting as judge or sheriff, and D. Gulley, who was present, confirms his statement.

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23d CONGRESS,  
1st Session.

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statement con-  
tinued.

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1st Session.

Mr. Moore's  
statement con-  
tinued.

*J. Davidson* saw no judges when he voted on Monday. Mr. Yantis was acting as sheriff, and Mr. McKee as clerk. The people had just been called off to hear the candidates

Mr. Moore's speak.  
The judges and sheriff even went so far as to take from my poll a vote legally given and received, and afterwards permitted the same individual to vote for my competitor. The depositions of *John Buford*, *John Salter*, and *Simeon Anderson*, prove that *John Brady* went to the polls on the first day of the election, having previously announced his intention to vote for me, and gave such vote, which was cried and recorded. Being afterwards coaxed or persuaded by some of Mr. Letcher's friends; he went to the judges, and requested that it might be erased. They at first hesitated, but afterwards did erase it; and then permitted him to vote for my competitor. No error in giving the vote was pretended. To some of the witnesses Brady said he had not correctly understood some of my opinions upon public topics. But can such a plea justify the judges of an election in permitting a man who has once voted "personally, publicly, and *viva voce*," according to his avowed intention at the time; to come in afterwards, say he has changed his mind as to the candidates, recall his vote, and vote for another? If he had mistaken names, or his vote had been put down wrong, or there had been any fault in the judges, sheriff, or clerk, by which his vote was erroneously put down, there would have been some ground of propriety in correcting the error. But in this case no error is alleged; it is admitted that the vote was *bona fide* given, to me; and that the only ground for erasing it was, that the voter had changed his mind! I need not depict the consequences which would spring from the establishment of such a principle in elections where votes are taken publicly and *viva voce*. During the three days of a Kentucky election, our judges would be sometimes constantly employed in changing votes backwards and forwards, and the whole poll book would be thrown into confusion. A wide door for monstrous corruptions would be opened, which, if not closed by new constitutional restrictions, would make suffrage mockery.

The evidences of undue bias in the managers of the Garrard election, through family connexions, party feelings, and local pride, already exhibited, are further strengthened by other incidents.

*Ned Donohoo*, a convict from the penitentiary, deprived of the right of suffrage by the constitution and laws of Kentucky, went forward to vote for Mr. Letcher, and his vote was received without objection. The judges could not plead ignorance, for he had married a niece of one of them, Mr. Wheeler, and, as afterwards appeared, was well known to him.

*John Ward*, another convict, under precisely similar cir-

cumstances, afterwards went forward to vote for me, and was promptly refused. Then, and not till then, Mr. Wheeler recollected that Donohoo was in the same situation, and his vote erased.

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23d CONGRESS,  
1st Session.

Mr. Moore's  
statement con-  
tinued.

There is much evidence tending to prove the quiet, the fairness, the impartiality of this election, and the absence of complaint. It must be remembered that every justice of the peace in the county, 15 or 20 in number, the sheriff and deputy sheriffs, every constable but one, 10 to 15 in number, and about four to one of the people of that county, were on the side of Mr. Letcher. Violently excited as they were, it is not surprising that the minority were very cautious in their bearing towards the other side, uttering but few complaints, and doing but little to vindicate their rights. One effort was made, however, by my friends, which did not so result as to encourage them to persevere in their efforts. Samuel Jackman made an effort to satisfy Mr. Yantis, then acting as sheriff, that he was in error in relation to a voter. *Benjamin Schooler*, in his deposition, gives the following brief account of the occurrence, viz.

"He understood Yantis and Jackman's dispute was about a voter, and that Yates, *then acting as sheriff, drew his sword cane on Jackman.*" And the deponent says he "*never heard of a sheriff drawing his sword cane in a controversy about a voter before in Garrard county.*" When the presiding officer of the election was thus ready to submit a trivial question to the arbitrament of the sword, it may well be imagined that a weak minority, however much wronged, would be cautious about uttering their complaints in public. They were prudent in quietly bearing the ills they could not avert, and looking for redress to the unbiassed authorities of their country. Had their complaints been too loud, or their efforts to cause the laws to be respected too zealous and persevering, the drawn sword of the sheriff might not so readily have returned to its scabbard.

The committee will readily conceive that the rumors of these transactions reaching other counties, perhaps in exaggerated forms, might reasonably induce an impression that the poll book of Garrard county, or at least of Lancaster, the county town, ought to be excluded altogether by the sheriffs, upon a comparison of the polls. If the sheriff of a county should bring to the comparison a poll book notoriously made up by persons who had no authority to hold an election, it will hardly be maintained that it ought to be admitted. Lawyers of good legal acquirement are of opinion that such is the Lancaster poll. They think that Grant was judge for the election; that the votes taken under his superintendence must be rejected, because they are not certified, and that all the rest must be rejected, because they were not taken by persons authorized to hold an election. As the committee have already seen, I have, upon examining the facts and law



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of the case, come to a different conclusion. I advert to that subject now, to show that the idea of possible exclusion of that poll in the comparison was not so entirely baseless, frivolous, and wicked as has been represented. When it is considered that all those managing the election were devoted political friends of my competitor, and most of them his family connexions; when some of them were permitted to act as judges and sheriffs, without color of law, or even the restraint of an official oath; when they could leave their official stations and go out into the country to rally voters for my competitor; when they could travel to the houses of his friends, and privately take their votes, contrary to law; when they had permitted men voting for me, afterwards, upon persuasion, treating, or some other considerations, to take back their votes legally given and recorded, and vote for my competitor; when they refused to let men vote for me, situated precisely as were others whom they had permitted to vote for him; when the arguments of my friends were met by *the drawn sword*; when all these things, magnified by rumor, reached me and my friends in other counties, it was enough to make us think the polls of that county totally destitute of legal validity, greatly deficient in moral truth, and entitled to no consideration by the constituted authorities.

The committee will perceive that a studied effort was made by the agents of my competitor (although disavowed by him) to prove some corrupt understanding between myself and Alfred Hocker, the sheriff of Lincoln county; who withdrew with his poll book from the meeting of the sheriffs. I might have directed the asking of a thousand questions, through my agents, in connexion with the outrages of Garrard, which would have reflected equally on his integrity and honor. But I despise that mode of warfare in an honorable controversy with another, as much as I defy it when employed against myself. While I shall not object to any scrutiny into my private walks and conversations, so far as they may be connected with public affairs, I certainly shall not resort to it in my conduct towards others. The uniform answers to all such questions, in the present case, prove to those who directed them how idle it is to attempt, by leading questions, full of hints and inuendoes, to prove that which exists only in their imagination.

I shall not attempt to justify Mr. Hocker, nor shall I condemn him. I will say of him, however, whatever may be the consequences to myself; that he is, in his moral character, one of the purest and most exemplary men I ever knew—far from accepting a bribe, or being guilty of a corrupt act, as the best of his accusers. He is a bold man as well as a good one. He may have violated the law; but he believed that the outrages on all law practised in Garrard county justified the act. There was no littleness, no management in his course. If his object had been corrupt, if his design had

been merely to give me the certificate, how easy it would have been for him to mislay the poll book of a precinct in his county, or procure some one to steal it, which would have left me a clear majority. But there was nothing little or mean in his course; he walked away with his poll book in open day, permitting the whole country to witness his act and judge of his motives. Admit that he was wrong; that nine violations of the law cannot justify a tenth; and that he ought to have submitted his poll book to the comparison; yet the openness and the manliness of his course ought to satisfy every one that there was nothing wicked or corrupt in his motives.

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statement con-  
tinued.

Although this matter has, in reality, nothing to do with the question before the committee, yet, as Mr. Hocker has been assailed in the questions asked by Mr. Letcher's agent, I should be unworthy of having a friend, if I did not, satisfied as I am that his motives were lofty and pure, however illegal may have been his act, take this opportunity to bear testimony to his worth.

But I did not attempt to profit by the act of Mr. Hocker. Conscientiously believing that I had a majority of the legal votes given at the election; unwilling to take a seat in the House so long as any honorable man could question that fact; and not considering myself at liberty to surrender to him a trust which I believed I held by the voice of the majority, I at once proposed to my competitor to surrender our respective claims, and submit the question to the decision of the people at the polls. This proposition he thought proper to decline.

I then caused a searching inquiry to be made into the bad votes given throughout the district; with a view of relinquishing my claim to the seat, if it should appear that I had not received a majority of the legal votes given at the election. The result was a full confirmation of the opinion I had before entertained. Still unwilling to trouble the House with a contested election, and desirous of avoiding the excitement, labor, and expense of taking numerous and voluminous depositions, I proposed to submit the facts collected to gentlemen of honor and integrity, a majority of whom had supported him in the election, with the understanding that we should be governed by their opinion. This proposition, also, he thought proper to decline.

No alternative was left to me but to come to Washington and claim the seat, or relinquish it to one who I was sure had not been elected by a majority of the legal votes. It was impossible for me to hesitate as to the course of duty, and I presented myself at Washington. I believed that the certificate of the sheriffs, which I held, was *prima facie* evidence of an election, and lawfully entitled me to take a seat as a member at the organization of the House. But unwilling yet to insist on my rights so long as any doubts

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existed in the minds of honorable men, I readily yielded to the suggestion of friends, agreed not to press my claim, and to submit the whole case on its merits to the Committee of Elections. Time was allowed us until the 1st of January, to complete our evidence in Kentucky, all objections to legal technicalities in relation to depositions already taken being waived on both sides; and now we appear before you, claiming a decision.

The fifth congressional district of Kentucky has been without a Representative for upwards of three months of an important session of Congress. Had my competitor acceded to my proposition to refer it to the people to decide which of us was their choice, or to men of honor and integrity to express an opinion upon the case, by which we should be governed, or had I insisted on my right to take my seat on the *prima facie* evidence, this state of things could not have occurred. The people of that district have a right to complain that they have no voice in the House, and any course, unless demanded by imperative circumstances, which should deprive them for a longer period of their just representation, would be an aggravation of the wrong which they have already suffered. My readiness to submit the case to their decision in such time that they would not have been deprived of any right here, has already been disclosed. But circumstances are now changed. Not only will they be longer deprived of their voice in the national councils if the case is now sent back to them, but I have a right to say that if I have established my claim to the seat, it will be a wrong to me. By the refusal of my competitor to resubmit the case to the people, and his opposition to my taking my seat here, he has imposed upon me immense labor and great expense in establishing my right. That I have established it beyond a reasonable doubt, I fearlessly maintain; and if the committee and the House shall accord with me, I submit it to them whether it would be just to me or my constituents to subject me to the further trouble of passing through the turmoil of another election, and them to the wrong of remaining for months to come without representation. I feel it my duty now, whatever I may have been inclined to waive heretofore, to insist on all my legal rights, without further delay. If I am legally entitled to the seat, let it be given to me; if my competitor is entitled to it, let it be given to him; but do not permit the people of our district to be longer unrepresented.

The majority for my competitor, as claimed to be established upon the poll books, is represented to be forty-four. Upon a careful examination of the evidence taken in this case, it will be seen that, after deducting those on both sides who have been proved to possess no legal right to vote, my majority is from *thirty* to *fifty*.

I herewith submit lists of votes given for Mr. Letcher in

the several counties which have been assailed as bad votes in this investigation, divided into classes, with the ground of exception, and the names of the witnesses whose evidence tends to prove their illegality. I also present an index to the names of the witnesses in the volumes of depositions which have been taken, by which the committee will be able to investigate each vote by me contested.

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The constitution of Kentucky extends the right of suffrage to "every free male citizen (negroes, mulattoes, and Indians, excepted) who, at the time being, hath attained to the age of twenty-one years, and resided in the State two years, or the county or town in which he offers to vote one year next preceding the election; but no person shall be entitled to vote except in the county or town in which he may actually reside at the time of election."

The law regulating elections provides (Digest, page 452) that "unless the sheriff, or one of the judges, shall know that the person offering to vote is entitled to suffrage under the constitution, the clerk of the poll shall administer to such person the following oath or affirmation," &c.

It is known to all those conversant with Kentucky elections, (and the volumes of evidence in this case prove it,) that this requisition of the law is but partially observed by the managers of the polls. The appearance of a name on our poll books must, however, be considered *prima facie* evidence of the legality of the votes, because it must always be presumed that the judges of the election have adopted all the precautions to exclude spurious suffrages which the laws prescribe. But this *prima facie* evidence may be rebutted by convincing proofs of a contrary description.

By reference to the accompanying lists, it will be perceived that about sixty votes were given to Mr. Letcher by persons alleged to be *minors*. In relation to a portion of them, however, the evidence is not such, it is presumed, as can be admitted as satisfactory by the committee. When the age of a person claiming to vote is questioned at the polls, he is put upon his oath, or proof of his majority is sought from his parents, or others who are conversant with the facts. Those found on the polls, carrying with them already *prima facie* evidence of their majority, the committee and the House will, it is presumed, require, to rebut it, direct and positive proof, or at least such strong circumstances as leave no room for reasonable doubt. As the mere declarations of the persons offering to vote would not be taken at the polls, so neither can they be admitted here, however clearly proved. Upon the same principle, I presume, the declarations of their parents, proved by third persons, must be excluded, except, perhaps, in cases where the parents themselves have refused to testify. The rule, I believe, is universal, "that the best evidence the nature of the case admits of, and that is within the reach of party, is always

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to be produced." I have, therefore, supposed that the oath of the voter himself, or of his parents, or of other persons who know his age, or proof of the original *bona fide* record of his age, or, in the absence of these means of proof, circumstantial evidence, leaving no reasonable doubt of the fact, would be required to prove minority. It is only upon such evidence that I claim to strike off the votes of minors given to my competitor, and of course I assent to the application of the same rule when it operates against me, reserving all objections to the credibility of witnesses.

It will be observed that there are several cases in which persons bound to service voted. In a country where the general usage is to bind out until the minor is twenty-one years old, the fact that any one is an apprentice, especially if bound out by the public authorities, is, of itself, strong evidence of minority, and perhaps ought to be conclusive. But, in addition to the objection to them on the score of minority, it may be worthy of consideration whether they are "*free citizens*," within the meaning of the constitution. Being under the entire control of masters, it would seem that they could hardly be considered as possessing that degree of freedom which is contemplated by the constitution as a qualification for suffrage.

The next class of voters to which exceptions are taken, are such as are not, by the constitution of Kentucky, citizens of the State: of these, there are two descriptions; first, such as have emigrated from other States, and taken up their residence in Kentucky. To entitle them to suffrage, they must have resided two years in the State, or one year in the county or town where they offer to vote. The principle in these cases is so plain that there is no difficulty except in relation to the evidence. The second description are such as have left the State, and returned to it: such cases have become numerous in Kentucky; but the acts which shall forfeit citizenship, and right of suffrage, when once acquired by birth or residence, are not defined in the constitution and laws of that State. That question must, therefore, be settled upon general principles. The general principle of law is laid down in Coxe's Digest, title Domicil, pages 258, 259, 260, viz.

"11. In questions on this subject, the principal point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence of even a few days."

"37. An inhabitant or resident is a person coming into a place with an intention to establish his domicil or permanent residence, and, in consequence, actually resides. The time is not so essential as the intent, executed by making or

beginning an actual establishment, though it is abandoned in a longer or shorter period."

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Vattel says, on page 169, vol. 1, "The *domicil* is the habitation fixed in any place, with an intention of always staying there." He who stops, even for a long time, in a place for the management of his affairs, has only a "simple habitation," but has no domicil.

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The case of *Easton vs. Rucker*, decided by the supreme court of Kentucky, 1st J. J. Marshall, 232, establishes the principles laid down above. The only difference between the authority there and Vattel is, that the common law court employs the word *residence*, and the civilian the word *domicil*, to signify that species of dwelling which the constitution and laws of the State contemplated as of any effect in cases like the present. And the judge says, *temporary residence* in place of *habitation*, as signifying that species of stopping or abiding which does not affect the right or character of a party as a citizen. This is the language of the chief justice :

"A citizen of Kentucky may have a temporary residence out of the State, and, if that be the case, it does not follow that the federal court has jurisdiction of his controversy with a resident citizen of the State ; for such temporary residence will not divest him of his character, or his rights as a citizen of the State.

"The term non-resident has frequently occurred in the decisions of the court of appeals of Kentucky, on questions touching the jurisdiction of the general court ; and it has always been considered that the meaning was, one who had his domicil out of the State, and not one who had a simple habitation in Kentucky."

*Ormsby vs. Lynch*, Littel's Select Cases, 204, supports this position. A number of persons have gone to Kentucky for the purpose of investigating their land claims, and residing there ten or fifteen years, and still maintain their suits in the general court as *non-residents*. Those persons have also maintained their suits in the federal court of Kentucky as citizens of Virginia, and ~~there~~ was their domicil, though they had a simple habitation in Kentucky for years.

Samuel H. Woodson, Esq. had a temporary residence or simple habitation in Lexington, Fayette county, within the year preceding his election to the Legislature, in 1820, from the county of Jessamine. His election was contested, on the ground he had not resided in the county of Jessamine for the whole year next before the election.—See Constitution of Kentucky, art. 11, sec. 4. The House decided, although these facts were incontestable, that he had not lost his citizenship or rights of domicil in Jessamine. The journals do not show the principles of the decision ; but the fact must be known to some members of Congress.

As regards native and naturalized citizens of the United States, simple residence only is required to entitle them to



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suffrage in the several States. The constitution of Kentucky considers a continuous residence in one county for a year, or in the State for two years, sufficient evidence of the intention of the person to become a permanent resident, to entitle him to suffrage. The legal doctrine of domicil must apply to residence, both being, in fact, the same thing. The right to vote acquired by residence, upon the principle of domicil, must cease when residence is acquired in another State. To acquire that residence, and forfeit residence in Kentucky, requires something more than removal to and location in another State. There must be the *animus manendi*—the intention to remain there. Where that intention exists, a residence in another State, however short, is deemed sufficient to deprive him of the rights derived from residence in Kentucky. Where the intention does not exist, no length of time can deprive him of those rights. These principles were substantially recognised by the Senate of Kentucky, in the case of a contested election between Samuel L. Williams and James Mason, Esqs. at the December session of the Legislature, in 1828. In an able report, drawn by a distinguished lawyer, then of the Senate of Kentucky, but now of the House of Representatives in Congress, I find the following remark on a voter whose right was contested, viz.

“Stephenson Ellison, alleged to have removed to Texas, was gone there five years, but a change of residence not proven to the satisfaction of a majority of the committee.” Senate Journal, page 154.

The Senate sustained the principles laid down in the report.

To lose a residence in Kentucky, therefore, it is necessary that the individual should settle in another State, *with an intention of remaining there*. The intention is to be ascertained by his declarations and his acts. Declarations alone are not sufficient; they must be accompanied by acts. The law is thus laid down in Coxé's Digest, page 258, viz.

“9. The question whether a person to be affected by the right of domicil, had sufficiently made known his intention of fixing himself permanently in a foreign country, must depend on all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to as affording the most satisfactory evidence of his intention.

“10. One who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidence of an intention permanently to reside there, as to stamp him with the national character of the State where he resides.”

Much more is he proved to be domiciled abroad who accompanies his act by a specific declaration of his intention.

From these principles, it follows that a voter of Kentucky, who leaves the State without the intention of returning, and

settles in another State for any period, however short, loses his residence in Kentucky; and if he afterwards return, he can acquire the right of suffrage again only by a new residence of one year in a county, or two in the State. And his intention may be proved by his acts alone, or by his acts and declarations united.

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Let us apply these principles to a number of those who gave their votes to Mr. Letcher at the late election. In Garrard county, he received the following votes of persons who had been domiciled in other States, with a specification of the evidence in each case, viz.

William Wiley's change of residence is proved by his declarations, by the act of removal to Indiana, and by his return there after the election.

William Quinn's, by his declaration, and by the act of removal to Indiana.

James Ballard's, by his long absence, and the purchase of land in another State.

Alfred Hunter's, by his father's removal to Tennessee, and residence there while he was a minor, the residence of minors being that of their parents.

Samuel Longnecker's, by his declarations, by his engaging in business in Tennessee, by his voting there, and by his taking up a residence there an indefinite period.

P. M. Brown's, by his removal to Missouri, and by his residence there over two years, in addition to the positive testimony of the witness, that "he was, beyond contradiction, a resident of Missouri."

John McCoy's, by his removal with his family to Indiana, by his residence there ten or eleven months, by residence of five or six months in Henry county prior to his return to Garrard.

William Wright's, by his removal to Indiana with his wife and family, in the fall of 1832, and by residence there less than a year.

James Bryant's, by his removal to Missouri, absence more than two years, and return there since the election.

Samuel Matheney's, by his removal to Indiana, thence to Missouri, thence to Illinois, and thence back to Kentucky.

Henry Stigall's, by his declarations, by his removal to Indiana, and by the declaration of his purpose of going to Missouri.

James Withers's, by removal to Indiana, and engaging in business there.

John Crook's, by entering into business in Indiana, where he had been sent by his father while a minor.

In Mercer county:

John Dixon's, by his removal to Missouri eighteen or twenty years ago, while a minor, his declaration that he had come back to Kentucky on his father's business, and should return to Missouri when it was completed.

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James Nichol's, by his removal to Missouri with his wife and family, for the purpose of making it his home, and by his subsequent removal to Illinois.

William Pearce's, by his removal to Indiana, living there four years, purchasing property, and declaring it to be his home.

M. Holly's, by his removal to Cincinnati, residence there a year, and engaging in the steamboat business two years.

In Jessamine county:

Greenbury Peyton's, by removal and settlement of his father in Missouri while he was a minor, the residence of the father being in law that of the child under age.

Charles Welsh's, by a residence of over two years in Missouri.

William Welsh's, by same.

In most of all these cases the proof of intention is believed to be entirely satisfactory, and that their votes are illegal.

The next class of bad votes is that of residents of other counties than those in which they vote. The principle in these cases is so clearly laid down in the constitution of Kentucky, that there is no room left for discussion except in relation to facts. Every voter must "*actually reside at the time of the election* in the county or town where he shall offer to vote." By the universal usage and understanding of the country, this residence is a man's *bona fide* home for the time. If he have a family, his home is with them. If he has never left the house of his father and mother, his home is there. If he have a fixed home, from which he goes forth to do jobs of work in other counties, and returns when they are completed, that is his residence. If he be a journeyman mechanic or laborer, who has lived in the State two years, or in any one county one year, without any permanent home, then the place where he is at work for the time being is his residence. But it is unnecessary to dwell upon this point. By an examination of the testimony, it will be perceived that about *forty* individuals voted for Mr. Letcher who are proved to have been, at the time, residents of other counties than those in which they voted, being from twenty to thirty more than voted for me under like circumstances.

The next class of bad votes consists of those given by persons under fictitious names, or who are entirely unknown in the counties where their names appear. The proof in these cases must be altogether negative, and should, therefore, be very strong to justify a rejection of the votes. Such proof I offer in relation to eight or nine votes given to Mr. Letcher in Jessamine. First, their names are not on the tithe book of the county for 1833, which is made up in the spring by commissioners under oath, appointed by the county court to take in lists of all free white males within the limits of the county over twenty-one years of age. But this is not conclusive, because individuals might be omitted by accident, or they

might remove into the county after that book is taken, and before the election. In addition to that, therefore, I offer the evidence, in most of the cases, of the two deputy sheriffs, who are well acquainted with every corner of the county, which is very small, and with most of its inhabitants. To this I add, in many of the cases, the evidence of respectable citizens long resident in the county, declaring that they have a general acquaintance in the county, and do not know any such men. The absence of their names on the poll book, the ignorance of the sheriffs in relation to their existence, to which is superadded the testimony of old and respectable citizens, afford a mass of convincing evidence that these votes are spurious.

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It is true that my competitor assails a number of votes given to me on the same ground, but I beg the committee to observe the difference in the testimony. The only evidence produced by him is, that they were not on the tithe book, and were unknown to one of the deputy sheriffs. Their not being on the tithe book is by no means conclusive, because a number of individuals are proved to be legal voters whose names are not on that book. Much less can the evidence of one of the deputy sheriffs be conclusive. Jessamine county, for the convenience of business, is divided by the deputy sheriffs into two districts, and James Loury resides in one, and John P. Loury in the other. If John P. Loury's testimony were conclusive that there were no such men in his district, (which it is not,) it would by no means prove that they were not residing at the time in the other. That such was not the fact, there is no other evidence than the tithe book and the absence of information in a gentleman whose business confined him chiefly to another part of the county.

But if this evidence be sufficient to strike the votes contested from my poll, then, upon precisely similar evidence, I claim to strike some fifteen or sixteen votes from his poll in Mercer county. They are proved not to be on the tithe book, and Basil Prather, a deputy sheriff, states that they are entirely unknown to him. If my competitor insists that his evidence is sufficient on this point in Jessamine, then I claim the application of the same rule to Mercer.

In Mercer he also endeavors to find a set-off for his unknown voters, by evidence of a grade still lower. Mr. Prather is asked whether he knows two men in the county of certain names, and, with one exception, answers in the negative. The apparent object is, to prove that the persons named voted twice, by the evidence of a deputy sheriff that he did not know both of them. It is not alleged that there are not two of each of these names on the tithe book, and the only evidence in their cases is the absence of information, in relation to them, of a single deputy sheriff. In a county where there are so many repetitions of the same name in father and son, and in collateral branches of the family, such

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evidence can have no weight, even though the names, or some of them, should appear twice on the poll book.

I revert, then, to my first position on this head, and maintain that negative proof, sufficient to authorize the deduction of a vote from the polls, should be of the strongest character; strong enough to leave no reasonable doubt on the minds of impartial men; and that I have produced such proof in Jessamine county. If, however, the proof adduced by Mr. Letcher in that county to produce a set-off, be deemed sufficient, I claim that the same measure be meted out to me in Mercer.

It will be perceived that, on the same principle, two votes given my competitor in Anderson, are proved to be bad by as conclusive testimony as the nature of the case will admit.

The next class of bad votes given to Mr. Letcher are those of the students of Centre college, located in Danville, Mercer county. It will be perceived that six of these were from other States, and eight from other counties.

The principles of domicile or residence, as hereinbefore laid down, apply to all these cases. It can scarcely need any evidence to prove, that when young men go to colleges, situated in other States and other counties, to obtain an education, they do not go with the *animus manendi*, the intention to remain there. The very nature of their object proves the reverse: Their object is to *get an education*, not to *make a settlement*. The *notorious object* being such as *requires* only a temporary residence, it affords as conclusive proof that such a residence only is *intended*, as any act of the party can furnish of an intention to make a permanent settlement. So conclusive must this evidence be deemed, that it would take some very decided acts and declarations to counteract it.

Young men of the South and West frequently attend the northern colleges, and spend three or four years there for the purpose of obtaining an education; but was it ever conceived that, by so doing, they forfeited their citizenship in their native States—Virginia, South Carolina, or Kentucky—and became citizens of Massachusetts, Connecticut, or Pennsylvania? Was it ever conceived that, upon returning to their native States, after finishing their studies, to enter upon active life, they did not possess the right of citizens, and were to be treated as aliens?

Here we have no declarations or acts indicating an intention to make Kentucky their permanent home. On the contrary, in addition to the obvious nature of their object in coming to the State, we have the declarations of some of them on oath, that their object was not to settle, but to obtain an education, and then go “wherever Providence might direct.”

The decisions of the legislative and judicial authorities of Kentucky, that absence from the State for many years, without proof of an intention to remain, shall not deprive any one

of his rights as a citizen; and, on the other hand, that a habitation in the State for many years—in some cases decided as many as twelve to fifteen—shall not make a man a citizen if his object be temporary, would be conclusive on this point, if there could be any doubt, upon first principles.

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Upon similar grounds, young men from other counties, who come to Mercer for the mere purpose of obtaining an education, can be considered only as temporary residents, retaining all the rights of citizens in the counties from which they come!

On these grounds, I deem the fourteen votes given to Mr. Letcher by students of the Centre college, and one given to me, to be clearly illegal.

In Garrard and Lincoln counties, it will be perceived that six or seven foreigners, not naturalized, voted for Mr. Letcher, and one only for me. The principles and proofs are so clear in this case, although some of the persons have long been residents of the United States, and have conducted themselves with the utmost propriety, that I deem it unnecessary to make any comment.

In Lincoln county, the votes of three deaf and dumb persons were recorded for Mr. Letcher. The constitution of Kentucky provides, article 6, section 16, that,

“In all elections by the people, and also by the Senate and House of Representatives, jointly or separately, the votes shall be personally and publicly given, *viva voce*.”

That a dumb person cannot vote *viva voce*, is sufficiently obvious; and of course it was never intended by the constitution that they should vote. It is not important to consider whether, since means have been discovered to educate these unfortunate persons, the right of suffrage ought not to be extended to them; it is sufficient that such is not the fact. In the case of contested election in the Senate of Kentucky, already referred to, this point was settled. In their report the committee say:

“James Yocum voted for Williams; decided by a majority of the committee to be illegal, because he was deaf and dumb, although proved to be intelligent; the committee were partly influenced by some proof tending to show he was overreached.”

But it is sufficient that they cannot vote *viva voce*, which the constitution expressly requires.

It will be observed that two persons voting for Mr. Letcher in Garrard are charged as not being of sound mind, or naturally so idiotic as not to be capable of exercising the right of suffrage. I think a perusal of the evidence in regard to them will satisfy the committee that the charge is made out. As a set-off, it is charged on the other side that two persons voting for me are lunatics. In relation to one of them, it will be seen that he manages his own affairs, and his right to vote has never before been questioned. In re-



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lation to the other, it is proved that he had been *once* found of unsound mind by the verdict of a jury; but *when*, is not stated. As men may be lunatics one day, and sane the next, it is obvious that no evidence to prove incapacity to vote can be admitted, *unless it apply to the time of the election*. Proof of lunacy a week before the election, is not proof that the voter was lunatic at the election.

It is proved that one officer of the navy of the United States voted for Mr. Letcher in Garrard. Whether he had such a residence there as to secure him the right, or whether, from other considerations, he was entitled to take part in the election, I leave to the decision of the committee without comment.

The case of John Brady has been mentioned in a foregoing part of this address. That the managers of the election had no right, after his vote had been given to me, *bona fide*, to erase it from the poll book, upon his simple allegation that he had changed his mind as to the merits of the candidates, and permit him to vote for my competitor, is sufficiently obvious. But this question, also, has been settled by the Senate of Kentucky. In the report already alluded to, I find the following case, which is precisely in point, viz.

"Wm. Spratt voted for Williams on the first day, in page 8, and on the third day he came in, had his vote altered, and voted for Mason. His vote on the poll book counts both for Williams and Mason. The committee determined that he had no right, after voting the first day for Williams, to change it on the third for Mason. Such a right would open a door to tampering and bribery. The result of the decision is, that one is to be taken from Mason, and Williams' is to stand."

Upon the same principle, my claim is clear to have John Brady's vote taken from Mr. Letcher, and restored to me.

On the Harrodsburg poll book one vote is given to Mr. Letcher by an error in the addition, embracing the first figure of the year 1833 as a vote.

Other votes, which I think lawfully given to me, were wrongfully erased, and ought to be reinstated.

Rowland Shields had no residence out of Garrard, but was a citizen of the State. He was at his brother's, and had agreed to work for him *before* the election, and in confirmation of this evidence of his intention to reside there, he remained at work with him for a month after the election.

Owen Hocker and Reuben Manifee appear to have had no residence but at their father's houses respectively, in Lincoln county, whence they went out to labor, returning when sickness overtook them, or their jobs were finished!

These three votes I think were legal, and ought to be restored to me.

Alexander West testifies that he voted for me, which is confirmed by the evidence of Pleasant Webb and Wm. S.

Campbell; but on the poll book his name is put down to Mr. Letcher. Bryce Murphy, of Anderson, testifies that he voted for me, and his vote is not recorded.

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On the other hand, there are allegations, supported by the testimony of the voters, that certain votes, given for Mr. Letcher, have not been recorded for him, and that several in the Salvisa precinct have been transferred from him to me. The certificate attached to the poll is, that "Thomas P. Moore received 301 votes, and Robert P. Letcher 70 votes." If the votes on the poll book be counted as they now stand, without reference to the additions at the foot of each column, it will appear that I received, in fact, 301 votes, and Mr. Letcher only 64. If, therefore, the certificate be corrected by the book, I shall retain my present number of votes, and he will lose six.

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The judges and clerk of the election at Salvisa are men of irreproachable character, entirely above the suspicion of attempting to commit fraud for their own benefit, much less for the benefit of another. The judges are justices of the peace for the county, and the clerk has been frequently a member of the Legislature, and they were all sworn to a faithful discharge of their duty. The poll book was in their possession until the close of the election and the execution of their certificate; up to that time it was in their power, and it was their duty to correct any errors which might have taken place in putting down the votes. Such, indeed, was the obligation of their oaths, which they could not, without guilt, disregard. Nor could they make or sanction any fraudulent alteration in the votes without the same guilt. I know the men too well to believe, and the evidence of their character is too strong for the committee to believe, that these alterations were fraudulent, or other than such as the judges felt themselves bound to make. The manner in which it is done forbids the idea that there could have been any fraudulent intent. The marks of the votes, as originally given to Mr. Letcher, are, in general, left standing on the poll book, obliterated, but not erased, so that the alterations are made palpable to any one who inspects it; and the design, if any existed, was so carelessly executed, that all these changed votes are taken in to make up the number assigned to Mr. Letcher in the certificate! If there had been a deliberate design to take the votes from him and give them to me, for a fraudulent purpose, would they have paid so little attention to it as to forget the very first step of the process, and omit to take them from him? It is admitted that the poll book furnishes strong evidence of *carelessness*. The changes in the votes could not have been made without the attention having been directed to each one separately; and there was great negligence in giving them to Mr. Letcher in the certificate, after they had been taken from him on the poll book. But this very inattention to the subject is

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the strongest evidence that there was no *fraud* in the trans-  
action. . Knavery is not wont to leave its work half done,  
nor to permit its footsteps to remain uncovered.

Not doubting that the judges and clerk of the election  
are honest men, I do not doubt that the alterations on the  
poll book were made because they were satisfied there was  
error in the original entries, which it was their duty to cor-  
rect. No other conclusion can be arrived at without casting  
the imputation of fraud, and that of the most petty and  
bungling character, upon honest and honorable men. I do  
not know the reasons why the alterations were made, but I  
have no doubt the judges believed each of the individuals  
had voted for me, and that the alteration put the vote where  
it ought to be.

The question next arises, whether the testimony of the  
men giving the votes shall be taken to convict the managers  
of the election of a petty and useless fraud. The point has  
been settled, that no parol evidence can be admitted to  
prove that a man voted otherwise than is shown by the poll  
book. Several cases much in point are given in the case of  
the contested election in the Senate of Kentucky, between  
Williams and Mason, already referred to, viz.

“Robert Raybourn intended to have voted for Williams,  
but his name was set down for Mason; the committee would  
not permit his vote to be changed. . Andrew Armstrong did  
not vote for Mason, as proved by a person who heard him  
vote; but the name was set down for Mason, and the com-  
mittee would not permit it to be taken off.”

“In the case of Robert Raybourn and Andrew Armstrong,  
the committee considered that it was a dangerous precedent  
to permit a vote that was given one way, to be changed by  
parol proof that it was given or intended to be given another  
way.”

“John Moss voted for Williams: proved that he intended  
to vote for Mason; the vote was not changed, for the same  
reason that Raybourn's and Armstrong's votes were refused  
to be changed.”

The doctrine here is, (and it is one which cannot be con-  
tested,) that so far as relates to the giving of the votes for  
one candidate or another, the evidence of the poll book must  
be taken as conclusive, and no parol proof can be introduced  
to contradict it. It is considered much safer to rely upon  
the integrity of sworn judges of high character, than to ad-  
mit the evidence of all sorts of people to convict them of  
error. More than error is here insinuated, if not directly  
charged; and shall evidence, which is inadmissible to prove  
*error*, be admitted to prove *crime*? Even if the committee  
have doubts, which I, knowing the men, have not, yet will  
they adhere to the principle so correctly laid down, and  
exclude all evidence other than the poll book itself, to prove  
for whom the votes were given. The rule is infinitely safer

than to permit votes to be changed afterwards upon the testimony of the voter, or other witness. In all such cases we have the testimony of four public officers, men of high character, acting under the obligations of an oath, against the single statement of we know not whom. It would be better that wrong should be done in one or a hundred cases, than that a door should be opened to abuses, briberies, and perjuries without end.

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tinued.

If the committee will turn to the Lincoln poll, they will find that a number of votes have there been changed from me to Mr. Letcher; and many persons have complained, and some have sworn, that they voted for me, and their votes have been changed to him. That it has been so in some cases, I have no doubt; but I neither call in question the integrity of the judges, nor ask that their errors shall be corrected. The consequences of permitting voters to come in and contradict the poll book would be so fearful that I do not wish to see such a precedent set.

On the whole, I cannot doubt that the committee and the House will consider each vote on the Salvisa poll book, as it now stands, put down to the proper person. In the case already alluded to, they will find a precedent for correcting errors palpable on the face of the book itself. Kentucky. *Senate Journal*, p. 149. By such corrections, Mason's poll was reduced three votes, and a few added to, and as many subtracted from, Williams', leaving it as it originally stood. By applying this principle to the Salvisa poll, it will be found that I have 301 votes, as certified, and Mr. Letcher only 64.

On a thorough examination of all these points, the committee will find that I have a clear majority of legal votes over Mr. Letcher, and on that ground, the ground of an election by a majority of legal voters, I am entitled to the seat.

But if the balance of votes were so equal as to make the turn of the scale doubtful, I might resort to my legal rights, and claim that all the votes so irregularly taken in Garrard county shall be struck from the polls. At any time when the interests of the people of the fifth congressional district were not suffering for the want of representation, and under any circumstances when a proposition on my part to refer the matter to the people had not been rejected, I would scorn to claim a seat in Congress, or to swell an undoubted majority, by availing myself of the law of the case, to take from the poll of my competitor the vote of one man who has a constitutional right to a free suffrage. But, under existing circumstances, I feel myself justified in requesting that the committee and the House will apply to my case the laws that have been prescribed for others. The leading principle settled in repeated decisions of contested elections for the House of Representatives is, that they must be conducted by the laws of the State in which they are held.

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tinued.

In the case of Jackson vs. Wayne, from Georgia, it was decided, that where the law requires the election to be held by three justices, and it was held by three persons, only one

of whom, in fact, was a justice, the proceeding was irregular. In the case of Eaton vs. Scott, it was held that if by law three are to preside at an election, the acts done by two are void. If they are to be sworn, the acts not under oath are void.

In McFarland vs. Purviance, the committee, by the opinion they expressed, sustained these decisions.

Except in the last case, which went off upon another point, the votes thus illegally taken were excluded by the House in coming to their decision.

This law, thus settled by repeated decisions, I claim to have applied to the polls of Lancaster in Garrard county. I have already shown that Moses Grant was illegally appointed a judge of the election on Monday morning, the duly appointed judge not having failed to attend, and all acts done while he officiated in that capacity are absolutely void. The votes taken under his superintendence are in law *no votes*, and, according to the precedents set by the House, must be struck from the poll. As well on this ground as because they are certified by Mr. Wheeler, who was not present when they were taken, I claim that the 72 votes proved to have been given to Mr. Letcher during that time, together with the 11 given to me, be deducted from our respective polls.

On the same ground, I claim that the votes taken on Tuesday, in the absence of the sheriff, proved to have been 34 for Mr. Letcher, and 16 for me, be also deducted from the polls.

On the same ground, I claim that the 4 votes taken on Wednesday morning for Mr. Letcher, while but one judge was present, as proved by H. Wortham, shall be deducted from his poll.

In like manner, I claim that every vote proved to have been taken otherwise than in presence of two legally constituted judges and a sheriff, all duly sworn, shall be struck from the polls.

If the committee and the House come to the same conclusion that I have on the evidence adduced, they will find that, on correcting the polls, and purging them of all votes illegally given as well as those illegally received, my clear lawful majority will not fall much below *one hundred and fifty*.

Thus far I have said nothing of the character of the witnesses introduced to prove bad votes given to me. Justice requires that I should call the attention of the committee to the evidence tending to show what degree of credit ought to be attached to the depositions of some of those gentlemen.

Samuel Clauch is proved to be unworthy of belief, when on oath. He admits that he voted twice, and received from two individuals 25 cents each for his second vote. This

confession, whether it be true or false, independent of the testimony of honorable men, is sufficient to render him infamous, and discredit all that he has testified. It seems he was so fearful of being apprehended for perjury, that he sought to escape before he had finished his deposition.

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Henry P. Horine shows on the face of his testimony that he was *employed* to hunt up bad voters, and swear to them. Though poor, and always in want, he devoted his whole time to the contest, and had money to buy votes with. In addition to the discredit which these facts cast upon him, his neighbors prove his having been engaged in buying votes at a preceding election.

Probably to strengthen Horine's testimony, Mr. Joseph Lillard is introduced as a witness, and travels over nearly the same ground. His neighbors prove that where his interests or passions are concerned, no confidence can be placed in his statements. Being my vindictive enemy, every line of his testimony is discolored by his brooding malice.

His son, Asbury Lillard, partakes of his father's feelings, and was so eager to bear witness against me, and to do it without restraint, that he went from Harrodsburg to Salvisa, a distance of eleven miles, without being summoned, and there gave his testimony, but did not subscribe his deposition.

Another son, John T. Lillard, was so determined to give his evidence, that he went on with it on the 1st of January, the day after the time allowed us by the committee to take depositions in Kentucky had expired.

Andrew G. Kyle admits that he was employed by Mr. Letcher's agent at a dollar a day, to hunt up bad votes given to me, and swear to them. Although candor requires me to say that, apart from the bias occasioned by his zeal as a partisan, I should accord to him unqualified credit.

I beg the committee to read the depositions of these men, and those which relate to their characters, when they will be satisfied that all which has been testified by some of them should be totally disregarded, and the statements of all of them received with many grains of allowance.

The depositions of John T. Lillard, William Downey, Robert Boyce, Will. Rice, and all others taken in Kentucky, on or after the 1st day of January, 1834, I except to altogether. The time for taking depositions in Kentucky was understood by me, and I believe by my competitor, to expire with the 31st December, 1833, and on that day my agents every where closed their business. In Harrodsburg, however, Mr. Letcher's agent proceeded on the 1st of January, nobody attending on my behalf. Not having an opportunity to cross-examine them, or rebut their testimony, I feel it my duty to request the committee to exclude them altogether from their consideration, although, if admitted to be valid, they could not vary the result.

I have now, more at large than I intended, given my



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views of the case as presented in the evidence. The voluminous character of the depositions, and the rough manner in which many of them are taken, require a good degree of courage to induce one to undertake their examination. The deep interest I feel in the result, induces me to hope that the committee will undertake the arduous labor which, so far as my evidence goes, I have endeavored to facilitate. Desiring nothing but justice, after the assaults made upon my character since I became involved in this controversy, I should be callous to all that makes life desirable, if I did not most zealously and perseveringly strive to obtain it. In these considerations I trust the committee will find an apology for this long address, as well as a motive, if one could be necessary, in addition to their public duty, to give the whole case their most deliberate consideration.

T. P. MOORE.

March 5, 1834.

C.

*Case decided in the Senate of Kentucky.*

Referred to in the report, *ante*, p. 751.

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in the Senate  
of Kentucky.

Mr. HARDIN, from the select committee to which was referred the petition of Samuel L. Williams, contesting the election of James Mason, as a Senator from the counties of Montgomery and Estill, made the following report, viz.

The select committee to which was referred the petition of Samuel L. Williams, in which petition he alleges that James Mason, who is returned by the sheriffs of Montgomery and Estill as being duly elected a Senator for the senatorial district composed of the counties of Montgomery and Estill, for four years, commencing after the last August election, was not duly elected; and that he, the said Samuel L. Williams, was duly elected for the senatorial district aforesaid, and for the aforesaid time, have had that subject under consideration, and report:

The committee, immediately after their appointment, entered upon the investigation of the subject referred to them; they have examined the whole of the depositions, poll books, petition, notices, and objections; the parties were heard by themselves and counsel, and, upon due consideration, the committee submit to the Senate the following exposition of facts, and their opinions thereon.

The petitioner, Samuel L. Williams, on the 14th of August, 1828, which was within ten days after the election, wrote a notice in due form, and delivered the same to Benjamin F. Thomas, a deputy sheriff for ——— Helm, sheriff of Montgomery county, to be executed on James Mason, the member returned, which notice was, on the same day, executed by said deputy, by delivering a copy (as the return says) to the wife of James Mason, at his, the said Mason's,

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residence, he, the said Mason, being from home, and the sheriff then and there explained the contents to Mrs. Mason. The counsel of Mr. Mason objected to the service of this notice as insufficient. After the objection was made, and before it was decided, the counsel of Williams produced to the committee the said deputy sheriff, and asked for permission to prove by him that, instead of delivering a copy of the notice, two counterparts were given him by Williams, both originals, and both alike, and that it was one of those notices that he gave to Mrs. Mason. The committee waived a *viva voce* examination of the sheriff, and informed the counsel to take his affidavit, and that it should have the same effect as if the sheriff was sworn and examined by the committee in the presence of the adversary party, which affidavit was filed with the committee: the notice and service are here referred to, marked (A,) and the affidavit (B.) The committee are of opinion that this notice and service do not only in substance, but in letter, comply with the requisitions of the law. The act of Assembly does not say how this notice shall be served, but leaves the previous existing laws to regulate it. By an act of the Virginia Legislature, passed in 1788, second volume of the Digest, page 957, it is provided that "notice on replevy bonds and other legal occasions, wherein no particular mode is or shall be prescribed, shall be good if given to the party in person, or delivered in writing to any free white person above the age of sixteen years who shall be a member of the family of such person, and shall be informed of the purport of such notice." By an act passed 1808, sheriffs and constables are authorized to execute notices, page of the Digest 957; now this notice has been served up to the fullest requirements and demands of the law. That the statutes above referred to are considered in full force, and have been considered the law of this land, (see 1st Bibb, p. 574,) an opinion delivered by Judge Bibb, and also (1st Monroe, 225) an opinion delivered by Judge Boyle. In those two cases the service of notice is sustained with a defective return made by a sheriff, but of the same kind as the present, and it is done upon the ground that the officer is presumed to do his duty until the contrary is made to appear, and that his official acts ought to be construed liberally to sustain them, and not rigidly to render them void. It was further objected that the original should have been delivered, and not a copy. In all cases of a notice, the law does not require two originals, nor is it material, when executed, whether the officer delivers a copy, and keeps the original, or delivers the original, and keeps a copy; but in this particular case there were two originals, one left and the other retained, and surely no objection could exist as to the power of the committee to have the officer sworn to that fact.

For the purpose of giving to this report as much perspicuity in the arrangement of the matter as practicable, the

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committee will proceed to give a statement of the polls. First, of the votes taken at Mount Sterling, counting the polls at that place by the face of the poll book, and the endorsements on the back of said book; but when the endorsements on the back of the book can only be explained by depositions, then those endorsements are not to be investigated under this first division of the subject, but reserved for another part of this report.

Secondly, of the Red river precinct, in Montgomery county.

Thirdly, the entire vote of Estill county.

The vote at Mount Sterling, as it counts on the poll book, is for Mason, 664 ; for Williams, 647.

The poll book, when counted by its face; and the endorsement on the back, stands thus. Take from Mason one for Andrew Alexander, see page 3, and also the back of the book ; take off one for Arthur Everman, see page 26, and back of the book. Wm. Spratt voted for Williams on the first day in page 8, and on the third day, he came in, had his vote altered, and voted for Mason, page 41. His vote on the poll book counts both for Williams and Mason ; the committee determined that he had no right, after voting the first day for Williams, to change it on the third for Mason ; such a right would open a door to tampering and bribery ; the result of the decision is, that one is to be taken from Mason, and Williams' is to stand ; one to be added to Mason for Thomas Terry's vote, where two nines follow each other, page 36 ; but this one is balanced by a mistake in the count, page 38 ; which mistake is in Mason's column, and is made by putting down the figure 4 after the figure 2 ; the whole corrections of the poll book, as to Mason, when made as above stated, reduce his number 3, which makes his vote at Mount Sterling 661. The corrections as to Williams, when made in the same manner, stand thus : Peter Evans' is erased on the poll book, page 44, but yet it is counted, which takes one from Williams ; Arthur Everman is to be added to Williams's poll, see back of the poll book ; those two corrections, when made, leave Williams's vote at Mount Sterling still at 647.

The vote at Mount Sterling, when corrected as above, stands thus :

	Mason.	Williams.
	661	647
Red river precinct, . . . . .	26	117
Estill county, . . . . .	352	280
	<hr/> 1,039	<hr/> 1,044
		1,089
		<hr/>
Majority in favor of Williams, . . . . .		5
		<hr/>

The committee will now proceed to investigate the votes which were given for Mason, and which Williams alleges are illegal. The proof consisted, principally, of depositions, and occasionally a reference to the back of the poll book, connected with the depositions. The committee took a separate vote upon each voter, as challenged. Some were decided legal votes by a unanimous vote, some by a majority only of four to three; others were decided illegal votes by a unanimous vote; others were decided illegal by a majority of four to three.

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Those who voted for Mason, and were decided by the committee as not being entitled to vote, are the following persons: John Alfrey, Jacob Butt, Isaac Butt, James Epperson, Nathaniel H. Foster, David Hathaway, Garrett Jackson, John Judy, Elijah H. Lockridge, Abner Maxwell, Hiram Moore, William Robertson, Edmond Smart, Kendall Shockley, Daniel Sublett, George Thompson, Wm. Underwood, Moses Tharp, Edward Wells, Henry Hart, Moses Gilvin, Thomas Glover, Berry Howell, Elijah Henderson, James Jemison, Wm. Morgan, John Welch, and Nelson Tapp, making in all twenty-eight. Of these twenty-eight votes, it is alleged by a minority of the committee, consisting of three, that seven of them are not within the notice; the other members of the committee, consisting of four, are of a different opinion. The voters who are alleged not to be within the notice, are Isaac Butt, Nathaniel H. Foster, Elijah H. Lockridge, Abner Maxwell, Hiram Moore, George Thompson, and Edward Wells.

The notice, after naming a number of persons by name, contains the following words: "And each and every of the persons who voted for you, and were set down for you on the poll book, were under twenty-one years of age; were not residents in Montgomery or Estill counties, and had not resided in the State two years, nor in the counties of Montgomery or Estill one year next before the election, and were destitute of the necessary and legal qualifications to entitle them to vote in Montgomery or Estill counties." A majority of the committee are of opinion that this specification is certain, to a common and reasonable intent; nay, that special pleading, which is never favored in courts, much less in a parliamentary body, would not require a greater certainty. It is a rule of law, without an exception, that when one instrument of writing refers to another, the other shall be taken as a part thereof. If an article of agreement, or a deed, refers to another article or deed, the same shall be taken as a part thereof, so far as the article which refers to the other makes the reference. The land laws of this State require entries for land to be special, definite, and precise in description; yet if one entry refers to another, the entry referred to shall be considered as a part of the last entry, so far as it may be needful to give the last entry locality. How often

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does one survey refer to the lines of other surveys. And when the lines of other surveys are found, it aids in fixing the position of the survey, making the reference: all these cases are of one class, and depending upon the same principle, which is an obvious one, that when one paper refers to another, the other shall be resorted to to explain the facts referred to. The same doctrine holds to an act of Assembly: where one act refers to another, both shall be taken together. See the numerous decisions of the court of appeals, and, also, first volume of Espinasse's N. P. 313; 2 Ventriss, 140.

Now when you apply this rule to the case under consideration, the notice refers to the poll books, and alleges that each voter on those books, who voted for Mason, was not, by the constitution, qualified to vote, and gives the causes of disqualification; such as non-residency, infancy, and a want of citizenship. It may be asked here, what specialty is further required in the notice? Those who are opposed to a majority of the committee, say their names are not given. The answer to that is, that the names are given, because the poll books are referred to, and they give the names; and can there be any difference in referring to the poll books, and making them thereby a part of the notice, and copying it in the notice? None, in estimation of law or common reason, and a reference to the poll books is much the most convenient way. It cannot be successfully alleged that the disqualification is not alleged, because, in truth and fact, not one of the seven voters who are contended not to be within the notice, was adjudged an illegal voter for any other disqualification than what is specially enumerated in this notice.

In deciding on this question, the Senate ought not to give in to a mode of construction which would render the right to contest an election a mere mockery. You tell to an injured individual, in the language of the constitution and the act of Assembly, that he has a right to contest an election, and claim a seat which the voice of the people of his country has given him; and yet you exact from him a compliance with conditions which are impracticable. Suppose a sheriff, as was the fact in this case, should choose to withhold the polls, how can he obtain them? Is there any law to compel the sheriff to give them to him? The answer is, none. Is there any law to compel the sheriff to permit him to examine the polls? Surely it will not be pretended there is any. The truth is, that, by law, the sheriff is to keep them, to compare the polls for Governor, &c. It is a matter of astonishment how Williams could give as many names from memory as he did. In reasoning upon this subject, as to the inconvenience which is to result by adopting the construction of the law and constitution as contended for on the other side, it is to be borne in mind that the notice must be made

out, and served within ten days after election. What is the real fact of this case in relation to these seven voters? Is Mason taken by surprise? 'No. Did he not attend, and take proof in relation to their qualification? He did. They are not qualified voters; and yet Colonel Mason wishes the Senate, by a construction more technical than ever was adopted in a court of justice, to permit him to retain a seat in the Senate, given to him by men not qualified by the constitution to vote. Colonel Mason and his friends ought to abandon such an objection, and if he will not do it, the Senate ought to be too mindful of its high standing and great responsibility to the people, to let the constitution and common sense be entangled, and fall victims to cobweb technicalities.

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But Colonel Mason may be asked, By what law is it you attempt to purge the poll of General Williams? The act of Assembly is totally silent on the subject. The answer is, and one that this committee subscribes to, that the genius of our Government and the constitution will not permit a man to hold a seat in our legislative councils, without being put there by the voice of the people. The committee will now proceed to investigate the votes which were given to General Williams, and which Colonel Mason alleges are illegal votes. In deciding upon these votes, the committee adopted the same rule as they did when deciding upon the votes alleged to be illegal that were given to Colonel Mason. And the diversity of opinion in the committee was nearly of the same character. A majority of the committee determined that the following persons, who voted for General Williams, were not qualified to vote, and that their votes were illegal, to wit: George W. Anderson, Elijah Allen, Bennet Barrow; Wm. Cromwell, Nixon Covy, James Davis, Joseph Irvine, William Gillispie, Bingham A. Graves, Alexander Haddin, Wm. Hatten, John Kirkley, Howell Monier, John Peyton, Henry Read, Andrew Rafferty, George Rogers, and James Yocum, making eighteen.

The polls, when purged by the committee, according to the foregoing report, stand thus:

Stricken from the poll of Mason, . . . . . 28

Stricken from the poll of Williams, . . . . . 18

The previous part of this report shows the aggregate number of Mason's votes, after counting the poll book of Mount Sterling by its face and endorsements on the back of the same, to be . . . . . 1,039

Deduct the 28 purged by the depositions, &c. 28

The residue of Mason's votes, ——— 1,011

The aggregate number of Williams's votes, when ascertained the same way, is . . . . . 1,044

Deduct the 18 purged by depositions, &c. 18

————— 1,026

Williams's majority, . . . . . 15



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Not to purge the polls of Mason of the seven votes which are contended not to be within the notice, Williams's majority will be eight. It was originally the intention of the committee to give an abstract of all the proof exhibited to them, but upon reflection it was found impracticable, owing, in part, to the immense size of the volume of testimony. The committee will therefore class the voters decided upon, presenting each point of law arising in their decisions; this, they apprehend, can be done by showing under which disqualification, as pointed out in the constitution, each voter fell, and then the Senate can refer to the depositions, if there should be any controversy about the facts. As to those who voted for Mason, and whose votes have been decided illegal: John Alfrey, was a citizen of Fleming, and his vote directed to be erased by the judges, on back of the poll book; Jacob Butt, lived in Bath, and went to the judges to get his vote taken off; (see the back of the poll book;) Isaac Butt, under age, his name on the poll book, and was at the election; James Epperson, lived in Bath, name on the poll book; Nathaniel H. Foster, under age, name on the poll book; David Hathaway, under age, name on the poll book; Garrett Jackson, under age, and lived in Bath, name on the poll book; John Judy, lived in Grant, was at the election, name on the poll book; Elijah H. Lockridge, lived in Indiana, was at the election, voted, name on the poll book; Abner Maxwell, lived in Clarke, was at the election, name on the poll book, and kept out of the way from fear of the law; Hiram Moore, lived in Bath, voted, on the poll book; William Robertson, under age, on the poll book; Edmond Smart, lived in Bath, on the poll book; Kendall Shockley, voted twice; Daniel Sublett, lived in Bath, name on the poll book; George Thompson, lived in Bath, voted, on the poll book; William Underwood, had not resided two years in the State, or one in Montgomery county, voted, on the poll book; Moses Tharp, lived in Boone, voted, on the poll book, and challenged at the polls; Edward Wells, lived in Bath, voted, on the poll book; Henry Hart, lived in Bath, on the poll book; Samuel Hart, lived in Bath, on the poll book; Moses Galvin, under age, and on the poll book; Thomas Glover, admitted by Mason to be bad, because he had not been either two years in the State, or one in Montgomery county; Berry Howell, lived in Fleming county, voted, on the poll book, and applied to get his name taken off; Elijah Henderson, lived in Bath, voted, name on the poll book; James Jemison, lived in Bath, voted, name on the poll book; William Morgan, lived in Bath, name on the poll book; John Welsh, name on the poll book, had not been two years in the State, or one in the county; Nelson Tapp, voted, on the poll book, lived in Bath, and fined for voting.

Those who voted for Mason, and were alleged by Williams to be illegal votes, but were decided by the committee to be legal voters, are the following:

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John Jividen, alleged to live in Bath, but not proven to the satisfaction of the committee; Franklin Orrear, alleged to be under age, but not proven; William Ballard, alleged to live in Clarke, but not proven, in the opinion of a majority of the committee; Garrett Ballard, alleged to live in Clarke, but not proven to the satisfaction of a majority of the committee; John Donohoo, alleged to live in Bath, but not proven, in the opinion of a majority of the committee; Jacob Donohoo, alleged to be under age, but not proven; Stephenson Ellison, alleged to have removed to Texas, was gone there five years, but a change of residency not proven to the satisfaction of a majority of the committee; Benjamin Fortune, alleged to be a non-resident, but not proven; Isaac Lewis, alleged to have moved to Indiana, but not proven; John Kirkpatrick, alleged to have moved out of the State, but not proven; Robert Raybourn, intended to have voted for Williams, but his name was set down for Mason, the committee would not permit his vote to be changed; Andrew Armstrong, did not vote for Mason, as proven by a person who heard him vote, but the name was set down for Mason, and the committee would not permit it to be taken off; Jehu Donohoo, alleged to live in Bath, but not proven.

The committee, in deciding upon the votes given for Mason, and which were determined illegal by a majority of the committee, had to determine what should be a sufficiency of proof that the person whose vote was challenged did vote. In some cases there was positive proof, in other cases the proof was circumstantial only. In the case of John Jividen and John Donohoo, the question was a mere matter of fact, where the Bath and Montgomery line run. The proof upon this subject is voluminous, and, if the Senate wish to see it, the depositions upon that point are referred to.

In the case of Robert Raybourn and Andrew Armstrong, the committee considered that it was a dangerous precedent to permit a vote that was given one way to be changed by parol proof that it was either given or intended to be given another way. The committee will pursue the same method in relation to the votes given for Williams, which Mason alleges were illegal, and which have been so decided by the committee.

George W. Anderson and Henry Read, admitted by Williams to be illegal; Joseph Irwin, proved to be under age, his name on the poll book; Elijah Allen, lived in Morgan, name on the poll book; Bennett Barrow, proved to be under age, his name on the poll book by the name of Benjamin Barrow, and proof, by his brother, that he was sometimes called Benjamin; William Cromwell, admitted by Williams to be illegal; Nixon Covy, name on the poll book, and proved to have been a citizen of Ohio until a few months before the election; James Davis, name on the poll book, and proved to have moved to this State not one year before the

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election ; William Gillispie, name on the poll book, proved to be under age ; Bingham A. Graves, name on the poll book, proved to be under age ; Alexander Hadden, proven to the satisfaction of a majority of the committee that he had been a citizen of Pennsylvania, and had not resided either two years in the State or one in Montgomery county, name on the poll book ; William Hatten, name on the poll book, proven that he moved from Indiana Christmas before the election ; John Kirkly, name on the poll book, proved to be under age ; Howell Monier, proves that he voted for Williams and was under age ; John Peyton and Andrew Rafferty, admitted by Williams that their votes are illegal ; George Rogers, name on the poll book, it is proved that he had neither been a citizen of the State two years, or county of Montgomery one year ; James Yocum voted for Williams, decided by a majority of the committee to be illegal, because he was deaf and dumb, although proved to be intelligent ; the committee was partly influenced by some proof tending to show he was overreached.

Those who were alleged by Mason to be illegal votes, but who were decided by a majority of the committee to be legal, are the following :

Harvy Berry, alleged to live in Bath, not proved ; William Brown, alleged to live in Morgan, not proved ; Willis Clark, alleged to be under age, and it is so proven, but no man by that name voted—William Clark voted, and not proven to be the same man ; Young Griffin, alleged to be under age, but not proved ; John Moss, voted for Williams, proved that he intended to vote for Mason—the vote was not changed, for the same reason that Raybourn's and Armstrong's votes were refused to be changed ; Edward Roberts, some mistake alleged in entering his vote, but none proved ; James Todd, alleged that he was no citizen and an idiot, but neither allegation proved.

The committee would here remark that there are about the same number of votes which were given to Williams and decided illegal upon about the same circumstantial evidence of the persons having in fact voted, as there were given to Mason, and decided also illegal upon the same character of circumstantial evidence of the persons having in fact voted ; so, if the Senate were to differ with the committee upon that point, it cannot change the result in the present contest.

The committee also report the following resolutions :

*Resolved*, That James Mason, who has been returned by the sheriffs of Montgomery and Estill counties to have been duly elected a Senator for the senatorial district composed of those counties, at the last August election, to serve for four years next ensuing, was not duly elected, at the election aforesaid, a Senator for the aforesaid senatorial district, by the qualified voters of said district.

*Be it further resolved*, That the petitioner, Samuel L.

Williams, was duly elected a Senator for four years then next ensuing, at the time aforesaid, and for the senatorial district aforesaid, by the qualified voters in said district, and that the said Samuel L. Williams is entitled to his seat, as Senator, for the time aforesaid.

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*Report of the Minority of the Committee.*

On the 9th of May, Mr. BANKS, of Pennsylvania, from the Committee of Elections, made the following report :

The undersigned, members of the Committee of Elections, to which was referred the inquiry into the true result of the election of a Representative in Congress from the fifth congressional district of Kentucky, not being able to embrace the conclusions to which the majority of the committee have arrived, beg leave to present the following view of the facts and principles on which, in their opinion, the question depends.

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The Representatives in Congress are to be chosen by the qualified electors of the most numerous branch of the State Legislatures, at such times and places, and in such manner, as the Legislature of each State may prescribe, subject to the power of alteration reserved to, but never yet exercised by Congress.

The constitution of Kentucky provides that Representatives shall be chosen on the first Monday in August of each year, but the election shall continue three days, at the request of any candidate. It also provides that "in all elections for Representatives, every free male citizen (negroes, mulattoes, and Indians excepted) who, at the time being, hath attained to the age of twenty-one years, and resided in the State two years, or in the county or town in which he offers to vote one year next preceding the election, shall enjoy the right of an elector; but no person shall be entitled to vote, except in the county or town in which he may actually reside at the time of the election, except as is herein otherwise provided."

It is provided by the same constitution that the elections for Representatives shall be held at the places of holding the courts in the several counties, or in such election precincts as the Legislature may establish.

The statute of Kentucky of December, 1799, enacts that the sheriff of each county shall advertise, at least one month before the first Monday in August in every year, the time and place of holding the election, and what offices are to be filled, and that the sheriff or other presiding officer shall, on the day of election, open the poll by ten o'clock in the morning, and continue the same open until at least one hour before sunset each day, &c. It directs the county court of each county, at their session next preceding the election, to appoint two of their own body as judges of the election, and a proper person to act as clerk; but in case the county court should not appoint, or any of the persons appointed should fail to

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attend, the sheriff shall, immediately preceding any election, appoint proper persons to act in their stead. It requires the judges of election and the clerk, before proceeding to act as such, to take the oath prescribed by the constitution; and expressly declares that "they shall attend to the receiving of the votes, until the election is completed, and a fair statement make of the whole amount thereof;" and requires that "the persons entitled to suffrage shall, in the presence of said judges and sheriff, vote personally and publicly, *viva voce*." Unless the sheriff or one of the judges shall know the person offering to vote to be entitled to suffrage, the clerk is directed to administer to him the oath, that he believes he is twenty-one years of age; that he has resided two years in the State, or that he has resided in the county one year last past; and that he has not previously voted at that election; or one or more parts of the oath may be administered, so as to remove the doubts of the sheriff or judge. A subsequent statute requires the sheriffs to deposite the poll books in the office of the clerk of the county court.

The congressional elections are held every second year, at the same time and places, and under the same regulations, as the elections for State Representatives, the State being divided into districts for that purpose. Upon the fifteenth day after the commencement of the election, the sheriffs of the several counties composing a district are required to meet at a designated place within the district, and then, by a faithful comparison and addition, to ascertain the person elected, and to make out a certificate of the election, which shall be signed by all the sheriffs of the district.

The fifth congressional district of Kentucky is composed of the counties of Lincoln, Garrard, Jessamine, Mercer, and Anderson; Harrodsburg, in Mercer county, was the place designated for the meeting of the sheriffs of that district. The election, now the subject of investigation, took place in August, 1833, when Robert P. Letcher and Thomas P. Moore, each of whom claims to be the Representative elected, were the only candidates for Congress in that district.

It appears, from a minute examination of the certified copies of the poll books of the several counties in said district, that, at the late election, the votes were given as follows, viz.

	For Letcher.	For Moore.
In Lincoln county, . . . .	650	501
In Garrard county, . . . .	1,075	247
In Mercer county, . . . .	685	1,468
In Jessamine county, . . . .	581	489
In Anderson county, . . . .	199	436

A faithful comparison and addition of all the votes thus given; exhibits a majority of forty-nine votes in favor of Letcher over Moore. The certificate of which result, had it been made out and signed by the sheriffs, as, under the provisions of the law already stated, the undersigned unhesi-



tatingly believe should have been the case, would have entitled Letcher to take the seat as the Representative from the district, and to hold it until his election should have been successfully contested. It is known to the House that no such certificate was given; that the entire vote of Lincoln county, which gave to Letcher a majority of one hundred and forty-nine, was not included in the addition and comparison made by the sheriffs; and that the majority of votes in the other four counties having been given to Moore, three sheriffs, out of the five, signed a certificate favorable to him; in virtue of which, he appeared in the House, and claimed to be sworn as a member, on the first day of the present session. And that opposition having been made, the subject was subsequently referred to the committee, and the district in question has been for five months without a Representative.

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The undersigned unite cordially with the majority in their reprobation of the conduct of Alfred Hocker, the deputy sheriff of Lincoln, who, by illegally withholding the poll book of that county, occasioned a result so extraordinary. We also concur in the opinion that the certificate signed by but three of the five sheriffs, and giving but a partial statement of the election, was wholly insufficient to entitle Mr. Moore to the seat. But we deem it proper further to state, that, as the case was referred to the committee before the evidences of Mr. Letcher's election came before the House for its consideration, there was, in our opinion, no decision, express or implied, as to the sufficiency of that evidence to entitle him to take his seat. And we maintain that, upon the failure of the sheriffs to ascertain and certify the result of the election, according to the requisitions of the law, or upon their making a certificate, which, upon its face, is insufficient and partial, certified copies of the poll books do constitute sufficient evidence of the election to entitle the person, in whose favor they show a majority, to take the seat, subject, of course, to future contest, and the final decision of the House. Whether the House would, in such case, refer the poll books to a committee, to examine and report in whose favor the majority of votes appeared to have been given, or would make that examination for itself, would be determined by its own sense of propriety and convenience.

The copies of the poll books, which form a part of the testimony before the committee, having been regularly certified by the officers in whose custody the law placed the originals, constitute, in the opinion of the undersigned, better evidence of the exact number of votes given for each candidate than the insufficient and illegal certificate of the three sheriffs; which, though transmitted to the House by the Governor of Kentucky, as the certificate sent to him from the fifth congressional district, is not, as the majority seem to consider it, the certificate of the Governor, and receives no aid, confirmation, or additional authority from his act—the sole effect of



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which is to identify the paper, and perhaps to attest the official character of the persons whose signatures were affixed to it. Under this conviction, the undersigned have no doubt that the House will adopt, as the basis of calculation in the present proceedings, the number of votes appearing on the copies of the poll books, which gives Mr. Letcher a majority of forty-nine votes, as before stated.

This majority appearing on the poll books, is decisive in favor of Mr. Letcher's right permanently to occupy the seat, as the chosen Representative of the district, unless, from the facts proved in the case, the House should decide that there has been no election, or should determine to make such deductions from the poll as will leave the majority of legal voters in favor of Mr. Moore.

The committee are unanimously of opinion that an election has been made by the electors of the fifth district, and that their choice should be sustained. But in arriving at the result of the election, (which we doubt not all have endeavored honestly to do,) the majority of the committee have made deductions from the poll, which, if sustained, will, in the opinion of the undersigned, not only defeat the choice of the majority in the present instance, but prove eminently dangerous to the great right of election, which is at the foundation of all our institutions. The majority of the committee have rejected 25 votes, of which Letcher received 22, and Moore 3; because they were given before ten o'clock on the first morning of the election, and because one of the judges who attended to receiving them had been, as they conceive, illegally appointed by the sheriff. They have also rejected 45 votes, of which Letcher received 32, and Moore 13; because they were given during a temporary and necessary absence of the sheriff on the second day of the election. All these votes, with two or three exceptions, are proved to have been given by legally qualified electors, entitled to vote at the place where they did actually vote. Other deductions were made, on the ground of want of legal qualification in the individual voters; with regard to many of which, as well as to other votes objected to, and not rejected, we differ from the majority, on grounds which will be set forth, after presenting our views in relation to the legal votes rejected for the causes above stated.

It is difficult to perceive the exact ground on which the votes given at Lancaster, before ten o'clock on the first morning of the election, are rejected by the majority. Was it because they were given before ten o'clock? The majority say they would not have been rejected on that ground if Mr. Wheeler, the judge appointed by the court, had attended and officiated from the time the polls were opened. Then they are not rejected because the polls were opened before ten o'clock. The inference is, of course, that if that circumstance is an irregularity at all, it is not sufficient to affect the

right of the voter. Was it, then, because the sheriff exercised the power of appointment at nine o'clock, or a little after, instead of waiting till ten? The majority are understood to have intimated that if the person thus appointed at nine had continued to act as judge throughout the election, the votes given before him between nine and ten would not have been affected: or that the fact of his only acting until the judge appointed by the court appeared and took his seat, makes some difference in the question. It would seem to be at least as reasonable that this change in the officers, after the election had progressed half an hour or more, should render illegal all the votes subsequently given, as that it should vitiate legal votes previously given, and which but for this change would have had their full legal effect. What were the facts? The cholera had raged with extraordinary virulence and fatality in the town of Lancaster, and in Garrard county, until some time in July, immediately preceding the election. The alarm of the people had been very great, and apprehension of the reappearance of the disease had been from time to time excited, up to the very period of the election, requiring considerable effort to induce the voters to venture to the polls. The idea that the assemblage of crowds in warm weather was an exciting cause of the pestilence, was prevalent there, as it was every where. It was therefore desirable, and actually desired, that as long a time should be allowed for voting as practicable. The sheriff, therefore, after having held an election in Lancaster for trustees of the town, and finding the morning considerably advanced, determined, without inquiring or ascertaining the exact time of day, to open the polls for the general election. Mr. Wheeler, one of the judges appointed by the county court, not being then in attendance, he appointed Mr. Grant, a justice of the peace, to act as judge in his stead, until he should appear; and having also appointed Esquire Landrum in the place of Isaac Marksbury, who refused to serve, he opened the polls with Landrum and Grant as judges, and McKee, the regularly appointed clerk, all duly sworn, ready to receive the votes. This preparation being made, the opening of the polls is understood to consist in a proclamation by the sheriff that the polls were open for the reception of votes, and an invitation to the electors to come forward and vote. The polls being thus opened, some twenty or thirty votes were given, when Mr. Wheeler appeared and took his seat as judge, about ten o'clock, Mr. Grant then retiring.

By the constitution of Kentucky, the people have a right to vote at any time on the first Monday in August, when they have an opportunity of voting; their right does not depend upon the time of day. By the law of Kentucky, which was intended to secure a full opportunity of voting, and not, in any respect, to limit the right in point of time, the sheriff is commanded to open the polls by ten o'clock. The known

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officer, whose duty it is to open the polls, proclaims that they are open for the reception of votes. The voters come forward, and find two members of the county court, from which body the judges are usually taken, and a clerk who has several times before acted as such, prepared in the courthouse to receive their votes. Are they to inquire the time of day before they can safely vote? and are all who come afterwards to inquire at what precise hour the polls were opened before they can safely vote? All know that their right of suffrage does not depend upon the time of day, but upon the opportunity of exercising it in substance in conformity with the constitution and laws. All know that the sheriff is the officer authorized to open the polls, and to fill vacancies in the other offices. Those who come first see that this has been done by the sheriff, and all others see that the election is going on as usual. If time were at all material to determine the right of the electors to vote, or the right of the sheriff to appoint the officers necessary to receive their votes, to what standard shall the electors or the sheriff resort to ascertain the exact time of day? Time is not material. The sheriff has a legal discretion, to be exercised in a reasonable manner, and in aid but not in restriction of the elective franchise. It is apparent that there was nothing unreasonable in the time of opening the polls in the present case, and it is highly probable that had a general inquiry taken place, it might have been found to be ten o'clock by more than one watch or clock in Garrard county. But the undersigned are clearly of opinion that no exercise of this discretion as to the time of opening the polls, however extraordinary and unreasonable, could affect the validity of legal votes given on the first Monday in August, after the polls were in fact opened by the sheriff, and received and recorded by the judges and a clerk appointed by the court, or, in case of their absence, appointed by the sheriff, unless the circumstances were such as to vitiate the whole election. The motives of the officers of the election can have no effect upon the rights of the electors; and it is difficult to conceive how their rights could be affected even by the conduct of the officers, unless that conduct had defeated, or was at least calculated to defeat the great object of the law; a full, fair, and free election.

The extreme case has been put of the sheriff opening the polls at one o'clock in the morning; and the particular objection seems to be that, in such case, the candidates, or one of them, and his friends, might not be apprised of the fact, and might not, therefore, be prepared with challengers to object to illegal votes. This would certainly be a most extraordinary case, and would subject the motives of the sheriff to the strongest imputations of fraud, unless some circumstance, equally extraordinary with the case itself, had occurred to justify it. But, upon the admission of the majority of the committee, that they would not have rejected the votes



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now in question, though given before ten o'clock, if the regularly appointed judges had been present; they could not, though the polls had been opened at one o'clock in the morning, have rejected legal votes given between nine and ten, or even between one and two o'clock, if the regularly appointed officers had attended at the opening of the polls, and had continued to attend to the receiving of the votes. The right of having any challengers at the polls, except the officers themselves, is not recognised or provided for by the constitution or laws of Kentucky. In considering the strict legality of the sheriff's conduct, this idea, therefore, has no weight, however it may affect the minds of any who have been accustomed to look upon challengers as a distinct legal part of the apparatus for carrying on an election. The law provides that, unless the sheriff or one of the judges knows the person offering to vote to be a qualified elector, an oath shall be administered to remove the doubt.

It is to be observed that no objection is made to the appointment of Landrum to act in the place of Marksbury, who refused to serve, although that appointment was made before ten o'clock; but the objection to the appointment of Grant is, that it was made before ten o'clock, and that the sheriff was bound to wait until ten, before the contingency of the non-attendance of Wheeler, on which depended the right to appoint another in his place, could arise, or be ascertained. It is just as true that the contingency specified in the law could not have arisen before ten o'clock in the other case. The contingency is not the refusal of the judge appointed by the court to attend, as signified, at any indefinite period before the election, but his failure to attend immediately preceding the election. And the majority say he has until ten o'clock. As long, therefore, as there is a possibility of his attending before the commencement of the election, which it is said must await his attendance till ten o'clock, the contingency of his failure to attend cannot have happened, and there can be no absolute certainty that it will happen. His previous refusal may render it probable, and may produce conviction, in the mind of the sheriff, that he will not attend, but it does not constitute the fact of non-attendance, nor is it the evidence appointed by law for the ascertainment of the fact. Mr. Marksbury might, in the course of a day, or an hour, have changed his mind, and, refusing to be a candidate, been willing to act as judge. According to the reasoning of the majority in the case of Wheeler, Marksbury had until ten o'clock to attend. Landrum was appointed in his place, and he did not attend at ten; Grant was appointed in Wheeler's place, and Wheeler did attend at ten. But until ten, was not Grant as much authorized to act as Landrum? Suppose Wheeler had not, in fact, appeared at ten, would not Grant's appointment have been good from the beginning? But these technicalities are, as the undersigned think, enti-



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tled to no place in a serious inquiry into an election and its result. If this were a dispute between Grant and Wheeler, for a part of the compensation allowed to a judge of the election, or if it were an action by Wheeler against the sheriff, for depriving him of the honor or emolument of that office, or for admitting another prematurely to a participation of it ; or, if it were a contest between parties for a right derived from the sheriff, or from his acts, these questions might be of more importance. But neither the right of election, nor the right of the person elected, is derived from the sheriff. The election itself is not his act, but the act of the people, who have a pre-existing right to make the election. And the agency of the sheriff, judges, and clerk, is created for the sole purpose of enabling them to exercise that right in a regular and orderly manner, and to make out and preserve the proper evidences of their act. The subject of inquiry is an election by the people ; the fact to be ascertained is, who has been chosen by the majority of qualified electors. There is no charge that the election was not full, free, and fair. There is no charge that ample opportunity was not afforded in the usual form for all the qualified electors to give their votes. It is not objected that any vote was given at a time when the election could not be constitutionally held ; nor, as to the votes given before ten o'clock, is it objected that there was any apparent deficiency in the machinery provided by law for carrying on the election. But, after all is over, it is discovered that a part of the machinery had been made too soon ; a flaw is picked in the title of one of the judges ; and qualified electors, who voted under the belief, common to all at the time, that every thing was as it should be, and whose votes would not have been again received at the same election, are rejected from the polls, and in effect deprived of the right of suffrage, because the sheriff, who, upon the non-attendance of the judge appointed by the court, had, immediately before the commencement of the election, a right to appoint another, did not wait till ten o'clock to see if the judge would attend, but, determining to commence the election before ten, filled the place with another.

If it were admitted that the sheriff exercised the power of appointment before it actually arrived, and therefore that Grant's title was defective, still he was appointed by the person having a contingent power of appointment ; the contingency was supposed to have happened ; the appointee was sworn to act as judge ; he was recognised as judge by the other officers ; he acted as judge with them ; he was considered as a legal judge by the voters, and votes were given and received under the belief that he was a rightful judge. No act of his is questioned, but the act of sitting in the place of a judge, and permitting legal votes to be recorded ; for all the votes given while he sat, with one or two exceptions, are proved to have been legal. It is the act of the

legally qualified elector that is not merely questioned, for proof of his legal qualification would meet a mere question, but is decided to be void and incapable of being made valid by proof, because it was done before, and received by this judge in conjunction with the other officers. If he had been the merest usurper of the place, if he had pulled one of the judges off of his seat, and occupied it for an hour, and, during that time, qualified electors, seeing him in possession of the place, and acting with, and recognised by the other officers, had given their votes, which were recorded, though the record made under his inspection might not be of itself sufficient evidence of the legality of their votes, it would seem that actual proof of that fact would be all that could be required to sustain them.

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But the undersigned are decidedly of the opinion that there was nothing contrary to law, in the conduct or acts of the sheriff, on the first morning; that, as the constitution names the day for holding the election, without restriction as to the hour, and the law directs the sheriff that he shall open the polls by ten o'clock on that day, he may rightfully open them at any reasonable time before ten; that, at whatever moment he may rightfully open the polls, he may, immediately preceding that time, fill up all vacancies then existing in the offices, for carrying on the elections. That the contingency, on which this power of appointment depends, is the non-attendance of the officer immediately preceding the commencement of the election, and has, by the law, no particular relation to ten o'clock, unless the commencement of the election is restricted to that time. To say that the sheriff, who is directed to open the polls by ten o'clock, and who is empowered to fill vacancies from non-attendance immediately before the commencement of the election, may open the polls before ten, if the officers appointed by the court are all in attendance; but he cannot open them until ten, if those officers are not all in attendance; and that he cannot fill vacancies before ten, because, per possibility, there might not be vacancies if he waited until ten, is to subject the sheriff's right of opening the polls, and his right of filling vacancies, to conditions and restrictions different from those prescribed by the law, which gives him a discretion as to the time of opening the polls before ten, and gives him a power to fill vacancies existing, whenever or immediately before he may lawfully open the polls.

But whether the proceedings of the sheriff were strictly regular or not, we had not anticipated that the legal votes given before ten o'clock on the first day, or those given in the absence of the sheriff on the second day, would be rejected by the committee,\* because the alleged irregularities,

\* That question was not taken up in the committee until the argument contained in the report of the majority was read for adoption the day before it was used in the House; it was then, for the first time, decided. We cannot anticipate that these votes will be finally rejected by the House.

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if, indeed, they were irregularities, did not affect the substance of the election, nor the rights of the electors, while the rejection of these votes would affect the substance of the election, and vitally affect the elective franchise; because the disfranchisement of these legal voters would change the majority in the present case, it would thereby defeat the whole object of the constitution and laws of Kentucky, and of the right of suffrage itself, by giving the choice of the Representative to the minority of the qualified electors who actually voted; and because, if it did not change the majority, and therefore would not affect the result in the present case, it would establish a precedent by which that effect might be produced in future, and one by which the officers of election, the mere instruments of the law for giving facilities and effect to the right, might, at any time, by an accidental, or, what is worse, by an intentional variation from the law, in some formal particular, unobserved, or deemed unimportant by others, virtually disfranchise a portion of the electors, and at their pleasure give the choice to the minority, by which means the election would, in effect, be taken out of the hands of the people, and placed wholly in the power of the ministerial officers.

The votes given on the second day of the election, in the absence of the sheriff, are considered to be equally free from technical doubt or difficulty as those of the first morning. These votes also, with one or two exceptions, are proved to have been given by qualified electors. After the polls had been regularly opened on the second day, and several votes had been given, the sheriff, being twice sent for on account of the extreme illness of his wife, who in fact died shortly after the election, at length left the polls, with the consent of the judges, and, having no regular deputy present, called up a young man of high respectability to attend the judges, with their consent. After four or five votes were thus received, the young man gave place to another gentleman, also of great respectability, who, with the like assent of the judges, attended them, and a number of votes were given and received while things were in this state, when Yantis, the deputy sheriff, came in and attended the polls. About forty votes were given after the sheriff left, and before the deputy came to the polls.

The question is, whether these legal votes shall be rejected, and the free electors, who voted under these circumstances, deprived of their voice in the election. So far as appears from the evidence, the principal act or duty actually performed by the sheriff, or his deputy, while either attended the polls, was to proclaim each vote as it was given. The duty expressly imposed upon the sheriff by law is that of opening and closing the polls, which it requires to be done by "the sheriff, or other presiding officer." It requires that the electors shall vote in the presence of the judges and

sheriff. It also provides that, unless the sheriff or one of the judges shall know the person offering to vote to be entitled, the oath entire, or in part, shall be administered, so as to remove the doubts of the sheriff or judge. His authority to appoint, in case of the non-appointment or non-attendance of the judges or clerk, has been before stated. The law does not require the sheriff to be sworn as an officer of the election, but rests upon his oath as sheriff. It does require the judges to be sworn as judges of the election, though they have been previously sworn as justices of the peace. The law confers upon the sheriff no judicial capacity for conducting the election. It does confer that capacity expressly and exclusively upon the judges, by denominating them judges of the election, and requiring them to be sworn as such. The law does not expressly require the sheriff to attend to the receiving of the votes, as it does require the judges to do, until the election is completed, and a fair statement made out of the whole amount thereof. The continued presence of the sheriff is not expressly required as a duty on his part, but it seems to be presumed or implied in the law, by the requisition that the electors shall vote in his presence.

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In what capacity, then, does the sheriff act? and what are his rights and duties, when, after opening the polls, he does, in fact, attend them? He acts merely in his character of sheriff, and can act by himself or deputy. He acts as a peace officer, to preserve order and prevent tumult. He acts as a ministerial officer, to call upon the voters to vote, and to see that they have an opportunity to vote in a regular and orderly manner, and to execute such order, in these respects, as the judges have a right to make. As sheriff, he is presumed to know, generally, the citizens of his county, and their qualifications as electors; and one great object of his attendance is to impart this knowledge to the judges. But if either of the judges know the person offering to vote to be qualified, the information of the sheriff is not required; and there is in such case no other agency on his part, in giving or receiving the vote, but what may be necessary to secure the approach of the voter to the polls. He might facilitate the vote of a qualified elector, who was known to him, and not to the judges, by imparting his knowledge of facts to them; but, in that case, the want of his information is supplied by the oath of the elector himself. The sheriff has no voice in receiving or rejecting a vote, but as an accredited witness: he cannot decide if the judges should differ in opinion. The agency of the sheriff, if present, is not to determine the right of the voter, but to facilitate its exercise; and, for the most part, his continued presence immediately at the polls is as much a formality, as his continued presence in a court of justice. His continued presence is as essential to the legal perfection of the judicial, as to the elective tribunal. It is always proper, often useful, and

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sometimes necessary. But where his active agency is not an essential part in the proceedings of a court, his occasional absence could scarcely render the proceedings void.

It is not pretended that there was any necessity for the active agency of the sheriff during any part of the time on the second day, when there was no sheriff in fact at the polls. There was no tumult or confusion; the votes were given slowly, and the polls were not crowded. No legal voter was obstructed or prevented in the exercise of his right, or met with any difficulty in approaching the polls, or giving his vote. Had the sheriff been present during the whole time, he would have been present as a mute and inactive spectator; or he might have proclaimed the votes, which the law does not require him to do, but which any other person might have done as well, and as legally, and which the persons occupying his place did in part do. His presence at the time was not needed for any actual exercise of his office or authority; it was not legally necessary for any practical purpose; but the law says the votes shall be given in the presence of the judges and sheriff, personally, publicly, and *viva voce*. The law does not expressly make it his duty to be present, but, supposing him to be present at the polls, mentions him and the other officers at the polls, as persons in whose presence the votes must be given, and it is his legal duty to be present. But, suppose that, after having done what the law positively requires of him in opening the polls, he turns his back upon them, or goes to a remote part of the court-house, or stands at the door and calls the voters to the polls, or goes into the court-yard, and during any such occasional absence legal votes are given in the presence of the judges, and recorded by the clerk, are they absolutely void because they were not given in his presence, when, if present, he would have had nothing to do, no active agency in receiving the votes, or in carrying on the election? Would these legal votes have been efficient, if given while he was at the polls sound asleep, or insensible, from any other cause? and are they invalid and inefficient because he was not at the polls? It does not even appear that the voters, or all of them who voted at the time, knew that the person who stood in the place of the sheriff, by the side of the regular officers, was not, in fact, a deputy sheriff.

Is nothing due to the fact that the two judges appointed to attend to receiving the votes, and who alone were empowered to judge of and admit the votes, were present with the clerk, and that they did go on to admit and record votes during the absence of the sheriff? Is nothing due to the fact that the election was an open and public proceeding, carried on in the presence of the citizens themselves, who were the real parties and agents in it? To the fact that the people of both parties were actually present, and looking on? That not a suggestion was made, nor a doubt entertained of the fair-



ness and validity of the proceeding; and that electors on both sides went up to the polls without suspicion or distrust, and honestly gave their votes according to their preferences, under the belief, justified by all the realities of the transaction, that they were exercising efficiently their right of choice? Is a proceeding of this character, when the absence of a sheriff, if perceived, was not felt, to be tested by all the technicality that would be applied to a criminal proceeding, and to be annulled and held for naught, for the want of his formal presence? For what will this heavy, this total forfeiture have been imposed upon the free electors, whose votes are thus to be cast away, and how can their right of election be restored?

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It is objected that if the presence of the sheriff may be dispensed with, so may that of the judges. But this does not follow. The judges have substantial duties to perform during the entire progress of the election, in attending to the receiving of the votes. The continued presence of the sheriff is a mere formality, if not a mere idea. His action is not always necessary, and was not at all needed while he was absent.

A further answer to the objection is, that we are not merely to inquire what are the strictly legal duties of the several officers of the election, and whether they have performed them with exactness; but that a far more important part of the inquiry is, to determine what effect a departure from the formal line of their duty by the officers, is to have upon the rights of electors whose votes have been given at the times and places, and substantially in the manner prescribed by the constitution and laws. The true question is not whether every officer, appointed to give security and convenience to the exercise of the right of suffrage, has done every thing that by law he ought to do, but whether every thing has been done that was in fact necessary to secure the full and free exercise of the right; whether the right has been, in fact, so exercised. If it has been so exercised, and the suffrages of a majority of qualified electors have been given in favor of any individual, an election has been made, and that individual is the person elected. His right is identified with the election itself, and the rights of the electors; all must be sustained or sacrificed together. If, then, in an ordinary transaction, it is a maxim of reason and of law, that a thing fairly done, and lawful in itself, is entitled to a favorable construction, that it may rather prevail than perish, how strong is our obligation, when an election has been fairly made by the full and free exercise of the elective franchise, to sustain it even by the most favorable constructions, rather than to destroy it, and with it the most important of human rights, and by nice and technical objections? When such an election has in fact been made, no decision which sustains the election, and the individual rights of the elec-



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tors, and the choice of the majority, can furnish so dangerous a precedent, as that will afford which defeats all or any of their rights on account of a mere technical breach of duty on the part of the officers, or of any minute variation from the formal requisitions of the law. If, in the progress of an election, seventy free voters had presented themselves to the officers of the election, demanding to have their votes received and recorded, and the officers, knowing them to be qualified electors, had refused to give them an opportunity of voting, and had them repulsed in mass; or if, upon their presenting themselves, the officers had closed the polls before they were compelled to do so by law, and had thus prevented them from voting, such conduct of the officers, in obstructing and defeating a right which it was their duty to aid, might be good cause for setting aside the election, and, if the majority was doubtful, or the election close, would be good cause for setting it aside, as the right of election might otherwise be given to the minority. The difference between such a case and this election, as it actually occurred in Garrard, is obvious enough. But if seventy votes of legally qualified electors, as deemed legal at the time, are now rejected as null and void, what will be the difference in effect between this case in the form it will then assume, and the case which has been supposed? If, after this rejection, effect is given to the majority of the votes remaining on the poll books, may not the right of election be thereby given to the minority of the qualified electors who presented themselves at the polls to vote? may it not be given to the minority of the qualified electors who actually did vote?

If Mr. Moore has received a majority of all legal votes given and appearing on the poll books, he is elected without the rejection of these seventy votes. And although, in that event, the rejection of these votes would not change the majority, nor place the right of election in the present instance in the minority, still, for the sake of that right, and of its future preservation, the undersigned would ask that a distinct negative be put upon their rejection, by inserting in the resolution declaratory of Mr. Moore's election, the exact majority in his favor of all the legal votes actually given. If, on the contrary, Mr. Moore has not a majority of all the legal votes, including the seventy in question, and he is declared to be elected in consequence of his having the majority of the remaining legal votes, such a decision will, as the undersigned solemnly believe, give effect in this case to the voice of the minority, and place in the hands of the ministerial officers of election a power over the result, subversive of all the objects of law, and destructive of the right of suffrage, and of that liberty of which it is the only certain guaranty. To determine that there has been an election, which consists in a choice being made by the majority, and yet, by setting a part of that election, to give the choice to

the minority, seems to be a decision as inconsistent with itself as it is with the rights of the majority.

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The undersigned, under these views of the question, feeling confident that these votes will not be considered void by the House, on account of the circumstances under which they were given and received, and, therefore, taking the votes, as they appear on the poll books, as the basis of calculation, proceed to examine the deduction which has been made by the majority on account of alleged want of qualifications in the individual voters, and to present their views as to the deduction which should be made on that account.

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The committee commenced their examination of the rights of individual voters without having established any general rules for the regulation of their decisions. They decided upon each case according to the circumstances attending it. In those decisions they endeavored to conform, as far as possible, to the same principles, so that their decisions might be uniform. It was thought by some members of the committee, that some general rules should be first adopted; but it was not done. The committee, after progressing some time, appointed a sub-committee, consisting of two members. This sub-committee was directed to examine the case fully, and, in their decisions, to conform to the rules which had been established by the committee in the decisions they had made. When this sub-committee agreed in opinion as to any vote, they were to decide it; when they disagreed, or when the case depended upon new principles, they were not to decide. They were to report their proceedings to the committee as soon as they had completed their examination. This sub-committee did perform their assigned duties, and decided upon many votes, at the same time leaving many open and undecided. They reported to the committee, and, after the committee had progressed for some time in the examination and decision of many, if not all the votes undetermined in Garrard county, the following resolutions were presented to the committee for consideration and adoption:

April 5, 1834.

“*Resolved*, 1st. That an individual, having the right of suffrage in the State of Kentucky, does not lose it by removal from the State *merely*, but there must be evidence of his intention, at the time he departs, to leave the State *permanently*, or proof of his permanent location elsewhere, to forfeit his right as a voter.” Yeas—Jones, Hannegan, Hamer, Vanderpoel, Peyton, and Hawkins. Nays—Banks and Claiborne.

“2d. That no name be stricken from the polls as unknown, upon the testimony of one witness *only*, that *no such person* is known in the county; and that where a man of like name is known, residing in another county, some proof, direct or

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circumstantial, other than finding such a name on the poll book, will be required of his having voted in the county or precinct where the vote is assailed." Unanimous.

"3d. That all depositions not subscribed by the witness be excluded, unless the certificate of a magistrate be sufficient, according to the law of Kentucky." Unanimous.

"*Resolved*, in the opinion of the committee, 1st. That, under the constitution and laws of Kentucky, deaf and dumb persons are not entitled to the right of suffrage." Yeas—Hawkins, Hamer, Hannegan, Peyton, and Vanderpoel. Nays—Jones, Banks, and Claiborne.

"2d. That votes recorded upon the poll book as given to one candidate, cannot be changed and transferred to the other by oral testimony." Yeas—Peyton, Jones, Hamer, Hannegan, and Hawkins. Nays—Banks and Claiborne.

"3d. That all declarations or statements made by voters *after the election*, relative to their right of suffrage, be rejected." Unanimous.

"4th. That we will receive no testimony taken after the first day of January, 1834." Unanimous.

"That when a name is found on the poll books, proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book, and that some proof, direct or circumstantial, other than finding the name on the poll book, will be required of the vote having been given by such minor in the county or precinct where the vote is assailed." Agreed to unanimously.

"*Resolved*, That the residence of young men from other States and counties, at schools, academies, or colleges, as scholars or students, is not such a residence as entitles them to the right of suffrage in the county where they are for the time being, and that all such votes be stricken from the poll books." Mr. Banks voting in the negative.

Those resolutions containing principles different from those which have been acted upon by the committee as governing them in their decisions, made it necessary that the committee should again examine the cases decided, which they did with great care, reversing many of the decisions they had made.

The resolution which declared as the opinion of the committee "that, under the constitution and laws of Kentucky, deaf and dumb persons are not entitled to the right of suffrage," was reversed after a brief existence of about four weeks, and the votes which had been rejected under its authority were restored to the poll books.

Under the last resolution, the names of D. D. McKee, A. W. Buford, Elijah Mount, C. Fitzpatrick, W. R. Preston, R. L. Berry, R. McKeown, G. M. Ormand, B. Leffler, who voted for Robert P. Letcher at Danville, in Mercer county, and the name of Lewis L. Mason, who voted at the same place for T. P. Moore, were stricken from the poll book by

a majority of the committee. We think the committee erred in this decision. In order that our opinions may be the better understood, we will give the substance of the testimony laid before the committee in regard to each of the persons above named.

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D. D. McKee was himself sworn, and stated that he was a citizen of Mercer county at the time of the last election; that before the election he had determined to make that county his residence; that he had come to Danville, and spoke for boarding before the election, but that he did not make permanent arrangements for boarding until after the election; that he made his home at a house in Danville at which he had formerly boarded; that he had some of his effects with him at Danville, and that his residence was at his father's, in Harrison county, Kentucky; that his effects consisted of books and clothes; that he never refused to pay town tax in Danville; that he had lived there one year, and two or three months of another, and thought he ought to pay but for one year; that he had said he would not pay until he inquired as to his liability for the two years' tax; that at the election he told all the circumstances, connected with his residence, to the judges, and that his vote was received by them without a dissenting voice that he heard of.

G. W. Donoughy was sworn, and said in his deposition that David McKee was a student at Centre college for some two or three years; that he stated to witness that he ought not to pay town tax; that he was not a citizen of the town, and ought to pay but for one year. He did, however, agree to pay for both years, and that he was then living in Danville.

Joseph Bullock states in his deposition that he has known David McKee about seven years; that he graduated with him at Centre college; that he considered McKee's residence at his father's, in Harrison county; that he considers the college register as showing the permanent residence of the students at the time they enter college; that McKee told him, on his way to his father's, before the election, that he had not taken boarding, but he said he had determined to settle in Danville. He did tell witness, before he voted, that he had determined to settle in Danville, and grounded his right to vote in this county, on that determination. From what witness heard him say, he believes that McKee did regard Danville as his home, as much as any place in the world. Witness thinks he had no permanent home, inasmuch as he had not finished his theological studies. Witness believes he had fixed on this county as his home, although he had not moved all his clothes from his father's. He thinks McKee had resided about four years in Danville; that he resided more than a year at Fayette, and had been at his father's about nine months previous to his return to Danville, where he intended to prosecute his stu-

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dies. That he does not believe that McKee will ever return to his father's, to make his permanent home there; that he knew from him that his determination had not been permanently fixed for seven years past; that he does not regard his father's as his permanent home now, nor has he done so for seven years. That he is twenty-seven or twenty-eight years of age; that he was sustained at college partly by his father and partly by some church; that he is now principally sustained by his father.

*Copy of College Register.*

- 1 David McKee, . . . 1828, Harrison county, Ky.
- 2 Alfred W. Buford, . 1828, Garrard county, do.
- 3 Elijah Mount, . . 1828, Shelby county, do.
- 4 John Lyle, . . . 1828, Scott county, do.
- 5 Clayton Fitzpatrick, 1828, Madison county, do.
- 6 William R. Preston, 1830, Clark county, do.
- 7 Raing L. Berry, . . 1831, Clark county, do.
- 8 Willar M. Riddle, . 1832, Decatur county, Penn.
- 9 Sam'l D. Burchard, 1831, Oneida county, N. York.
- 10 Robert McKeown, 1832, Jefferson county, Ky.
- 11 Ralph Harris, . . 1832, Charlotte county, do.
- 12 Giles M. Ormand, . 1831, Dallas county, Alabama.
- 13 Blackburn Leffler, 1833, Washington county, Ind.

Mr. Buchannon, professor in the college, says, in his deposition, that the abovenamed persons entered the college at the dates set opposite their respective names; that they are all above the age of twenty-one years; that he does not know whether they are staying merely to complete their education or not; he thinks that is the purpose for which they are staying in Mercer county. That David McKee graduated in September, 1832; that he remained a few months afterwards here; he then left this, and returned some time last summer; he was at his father's during part of the time he was absent, in Harrison county, Kentucky. That Alfred W. Buford left this place about September last, and has not returned. Elijah Mount left this in November last, in consequence of ill health. If his health should be restored, he will return. William R. Preston graduated in September last, and has left this place. When he speaks of the residence of those persons, he means to be understood as speaking of that given when they respectively entered the college. That they all lived in Mercer county at the time of the last August election. He believes that they did militia duty, and worked on the roads, as citizens of Mercer county, since they came to it. He heard Mr. Fitzpatrick, about eighteen months ago, speak of going home to his father's house, and he did go. He heard Mr. Mount speak of going home. He does not know that any of them claimed citizenship in any other State.

Mr. Young, who is president of the college, states that he knows all the students named in the list spoken of by Mr. Buchannon; that they are all of full age; that they are their own masters; that they have come to college on their own means, or on means furnished by others than their parents; that when they leave college, it is not their intention to return to the places entered in the register, and to reside there permanently. The register merely shows where they originally came from, and no more. That Mr. Buchannon has mistaken the purpose for which witness had the register made, and is, therefore, in error on that subject. The students have commonly voted here.

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Taking the testimony of David McKee and others, it is proved beyond all question that he was between twenty-seven and twenty-eight years of age; that he was raised in Kentucky, and that he was actually residing in Mercer county at the time of the election. It is proved that he had not made his father's house his permanent home for the last seven years; that he had determined to locate himself permanently in Mercer county for one year; that he was actually residing there. His right to vote was undoubted.

Robert McKeown states in his deposition that he was raised in Jefferson county, Kentucky; that his father is dead; that his mother still lives there; that he has been living in Mercer county, as a student of Centre college, upwards of two years; that he worked upwards of two years in Louisville at the printing business, before he came to Mercer; that he had no other home at the time of the election than in Mercer county. When he leaves Danville, he expects to go east to finish his studies, and, when that is done, to go wherever Providence may seem to direct; that he has no intention of ever living in Jefferson county again; that when he goes there in vacation, it is only on a visit to his mother; that he has performed militia duty in Danville; that he voted for R. P. Letcher; that he considered Danville his home; that he worked a while in Danville at the printing business.

It appears to us that his right to vote is clearly established. He was raised in Kentucky, and had resided in Mercer county for two years, and had no other home or residence than Danville, at the time of the election. The persons whose names we have mentioned as being stricken from the poll books, were students at Centre college. Their votes were received by the officers of the election; this would be *prima facie* evidence of their being legal votes. He who denies their right must prove satisfactorily that they did not possess it. The register proves nothing but the place from which they originally came, and the time of their entrance into college. It does not prove, nor purport to prove, even the time they came into the State or county. They performed all the duties of citizens, and could not be denied the rights of citizens. By the constitution of Kentucky,



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there are three requisites to entitle a man to vote. He must be a free male citizen; he must have attained the age of twenty-one; and he must have resided in the State two years, or in the county one year next preceding the election. This age and residence give a positive and vested constitutional right; of this right he cannot be deprived without a palpable violation of the constitution. The questions to be put to a voter are, Do you believe that you are twenty-one years of age? Have you resided two years in the State, or one in the county? Do you actually reside at the time of the election in the county in which you offer to vote? If these questions are answered in the affirmative, his vote must be received. His employment forms no part of his qualification, nor is it material how long he intends to reside in the county after the election. The right is founded in prior residence, and his intended future residence neither gives nor tends to defeat it. Those persons were all twenty-one years of age. They had been in the State or county the length of time prescribed by the constitution, and actually resided in the county at the time of the election. This is all the constitution requires, and it is not for us to require more. We think the majority of the committee erred in rejecting their votes.

R. P. Letcher claims that the votes of John McHan, Reuben Young, Vincent Joye, Jacob Coffman, William Jenkins, and the reverend David Robertson, which now stand on the Salvisa poll book for T. P. Moore, should be deducted from the votes given to T. P. Moore, and added to those given to him. The evidence on which this claim is founded, will be given in substance.

John McHan says in his deposition that he voted for R. P. Letcher at Salvisa on Monday of the election; that he has examined the poll book, and finds that his vote is put down for Moore; that his name is spelt McHan, and not Machan, as it is on the poll book; that he knows no man of that name in the county.

We have examined the poll book, and find the name of John Machan on the first page. This name is not found in any other place on the poll book, and the name John McHan is not found at all on the poll book. We have no doubt the name on the first page is the name of the witness, and it is recorded for Moore. There are evident marks on the poll book that the vote had been placed in Letcher's column; it is crossed out, and the vote now stands for Moore. The addition of the column, as made by the officers of the election, is for Moore twenty-six, but counting this vote for him would make twenty-seven. In Letcher's column the addition, as made, is four, but, as the votes stand, this vote being taken from him, it is but three.

Reuben Young in his deposition states that he voted for Letcher at Salvisa; that he has examined a certified copy

of the poll book ; that he finds an 0 set down in the column of votes given to Letcher opposite his name, and the figure 1 in the column of votes given to Moore.

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Vincent Inge is sworn, and, in his deposition, states that he voted for Letcher at Salvisa, and he thinks on Tuesday ; that the name of Wilson Inge is put down for Moore ; that he knows no man of that name ; this name is found but once on the poll book, and the name Vincent Inge is not found on the poll book ; that his vote has been put down for Letcher, and erased, and put down for Moore.

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William Jenkins states in his deposition that he voted for Letcher at Salvisa ; that he does not know who changed his vote ; that he voted just before or after Alfred Kays.

The reverend David Robertson states in his deposition that he voted for Letcher at Salvisa ; that he examined the original poll book at the clerk's office in Harrodsburg ; that his name was written, as he thinks, by Lanty Holeman ; that his vote has certainly been erased from the column containing Letcher's votes, and placed in Moore's column ; that the ink with which his name is written is, in his opinion, different from that with which the alteration is made.

A. Kyle states in his deposition that he has examined the original poll book on file in the clerk's office ; it appears clearly and plainly to have been altered. The votes altered are John Machan, Reuben Young, Wilson Inge, Jacob Coffman, William Jenkins, and David Robertson. On every page where alteration is made, the number of votes, as counted and put down by the clerk of the election, does not correspond with the number of votes in either of the columns, as they now stand. The number of votes on each page where an alteration is made is increased one vote for Moore, and that of Letcher reduced one.

John Leggett states in his deposition that the Salvisa poll book was shown him by the clerk ; that it evidently showed changes and erasures of votes, so as to increase Moore's votes, and decrease Letcher's. The columns in which Letcher's votes were entered exhibit erasures, and the votes thus erased were put down in Moore's column. It is evident to witness that the alterations were made after the columns were added up, and the number of votes certified. The number of votes certified by the judges to have been given to Letcher is seventy ; as the poll book now stands, the number, according to witnesses' count, is sixty-four.

On examination of the certified copy of the poll book, the facts are found substantially as stated by the witnesses. The fact that in each column, where an alteration and erasure is made, the number is less by one vote than the addition of the clerk, and that the column to which the vote is transferred counts one more than the addition of the clerk, is strong evidence that the alteration was made in each column, after it had been added up. The judges certify that Letcher received at that place seventy votes ; on

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counting the poll book he has but sixty-four : these six votes are wanting to make up the number which the certificate gives him. It also appears that, counting the votes as they now stand for T. P. Moore, the number and certificate agree. The certificate and poll book do not agree as to both columns. When we add to this the evident, manifest, and palpable erasures apparent on the poll book, and sworn to by a number of witnesses, and confirmed by the oath of each voter, except Coffman, whose deposition was not taken, that he voted for Letcher, it would appear that little or no doubt could be entertained but the poll book had been altered. The face of the poll book, the addition of the clerk, the certificates of the judges, the oaths of the voters, all tend to establish, and, in our opinion, do establish this fact. No fact can well be more fully established ; it is established by positive testimony, and confirmed by every circumstance connected with the transaction. These cases differ from the cases of alteration put by the majority of the committee. They put the cases as alterations made by the officers of elections. The officers had ascertained that the voters in other cases had not a right to vote. Testimony was laid before them, sufficient to satisfy them that such was the fact. The judges in such case had the right to make the correction. Their duty is to certify the legal votes received, and no others. If they find, at any time before the election is closed, that an illegal vote has been received, it is their duty to make the correction. In such case, the alteration is made by the officers in discharge of their duties. Such is proven to have been the fact as to all the alterations but the six we speak of. In those six cases there is no proof that the alterations were made by the officers of the election. The proof irresistibly leads to the conclusion that they were made after the books left the hands of the officers. The difference in the cases is obvious, and cannot but be perceived by every one on looking to the proof. The question is, can this alteration be corrected ? We should look at the expression made at the polls, as the highest evidence of the choice of the people. The poll book is evidence of that choice. If that evidence has been altered or defaced, it would be monstrous if it could not be corrected. There is no way to reach this but by parol testimony ; it must be resorted to, from the necessity of the case. There are cases, where, to prevent greater evil, the truth must not be suppressed, although to be established by parol proof, even against a writing. The proof here is not to contradict the writing, but to show that the writing has been altered, and what it was before the alteration was made. The propriety of this is apparent. We think the rule adopted by the committee, if it even be right, should not be applied to a case of this kind.

The majority of the committee decided that Huke Huffman had no right to vote in Garrard county. He voted for Letcher. His vote was stricken off by the majority of the

committee. The following is the testimony as to his residence :

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Augustin Jenhings states in his deposition that in his opinion the voter lived in Lincoln county ; that he never traced the line between Garrard and Lincoln counties, but thinks, from the direction of it from a certain point or line tree which he knows, Huffman's house must be in Lincoln. Burket Mershon proves that he has known the line for twenty years ; to run it from a point where he knows it, so as to include in Lincoln the house of Mr. Porter, which is regarded as being in that county, Huffman's house will be thrown into Lincoln near one hundred yards. Witness was present when Huffman voted ; he was questioned by the judges as to the county in which he lived at that time, and he stated that the line run through his house, and his vote was received.

Dr. B. Duncan proves that he was raised about a mile from the line ; that he understood that it was run five or six years ago ; that he knows where Huffman lives. Witness understood the line runs between Porter's house and kitchen, and left Huffman's house in Garrard. Witness was raised about two miles from Huffman ; he does not know that the line lately run followed the old line, nor on which side it leaves Huffman.

It appears to us that there was uncertainty as to where the county line was. The voter was questioned at the time by the officers ; and as they decided in favor of his voting in Garrard, we think the vote ought to have been retained. It will also be observed that both counties are in the same congressional district.

Paris Conner's vote was stricken from the list of votes given to Mr. Letcher. Alexander Boyle proves that he has seen his name on the poll book for Letcher. That he has obtained the copy of his age from the family Bible, and that Paris Conner was born the 14th March, 1814.

Peter M. Brown. This vote was also stricken from the list of votes given for Letcher. It is proved by Martin Turill that Peter M. Brown had moved to Missouri, and moved back just before the election of presidential electors ; that he was not a year in the State before the August election. He heard Letcher admit that it appears by the poll book that Peter M. Brown voted for him.

J. L. Stevens. That he thinks he saw his name on the poll book.

The vote of William Harrison Kemper was also stricken from the list of votes given to Letcher. Mason Thompson states that he thinks he voted in Garrard ; that he sees the name on the poll book for Letcher. The vote of Chauncey B. Sheppard was also stricken from the list of votes given to Letcher. William Mason states that he knows Sheppard ; that he does not know whether he voted or not ; that he told witness the winter before the election that he was in his

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twentieth year. The vote of John G. Pond was also stricken from the column of votes given to Letcher. Benjamin Schooler proves that he has seen the register of Pond's age; that he was twenty-one on the 7th or 17th of August, 1833; he thinks on the 7th; that it appears by the poll book that he voted on the first day of the election, which was the 5th day of August. Witness states that he does not know that he voted at all; that there are four or five hundred votes in the county unknown to him.

Johnston Finnell swears that he was farming land in Garrard county; that he boarded in Madison county; that his father lived in Garrard; that his home was at his father's, had his washing done there, voted no where else, did not think he had a right to vote any where else; he voted for Letcher; his vote was stricken off by the majority.

James House. Burket Mershon proves he was making a crop in Lincoln county, and lived there at the time of the election. James House swears he was making a crop in Lincoln county at the time of the election; that his mother lived in Garrard; that he had his washing done at his mother's. The majority of the committee deemed his vote good. He voted for Moore.

We think these votes were stricken off in violation of the following resolution of the committee: "That when a name is found on the poll book, proof that an individual of that name resides in the county, who is a minor, is not sufficient to strike the name off the poll book; and that some proof, direct or circumstantial, other than finding the name on the poll book, will be required of the vote having been given by such minor in the county or precinct where the vote is assailed." There was no evidence that these minors voted, other than that the names were found on the poll book. This the committee have, by their resolution, determined is *not sufficient* to strike the name off; and that some proof, direct or circumstantial, other than finding the name on the poll book, *will be required* that the vote was given by such minor. These votes were stricken off without any evidence but what in the resolution is declared insufficient, and without that direct and circumstantial proof which they have solemnly resolved shall be required.

It will be seen, by the following statement of evidence and decisions, that the committee have in some cases, which cannot easily be distinguished from those just given, adhered to the letter and spirit of their resolution.

Joseph Wells. George Passmore states that he has lived in Harrodsburg for forty years, and that he knows Joseph Wells, and believes that he lives in Washington county; that he knows no other man of that name in the county; that he is well acquainted in the county.

Robert Curry says he is well acquainted with Joseph Wells;

that he formerly lived in Washington county, but he believes he has moved to one of the lower counties.

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William Downey proves that he knows Joseph Wells, and that he lived in Washington county at the time of the last election. The name of Joseph Wells is found on the Harrodsburg poll book for Moore.

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Harrison Moore. William Downey proves that Moore lived in Washington county at the time of the election. His name is found on the Harrodsburg poll book, page 27, recorded for Moore.

Absalom Holt. R. Wheat proves that Holt lived in Anderson county at the last election. His name is on the Salvisa poll book for Moore.

Garrett Jordan states that he knows that Holt lived in Anderson county at the time of the election.

Thomas Wade. Joseph H. Wilson proves that Wade told him he had come to the State from Illinois last spring, and had not been in the State a year before the election; that he told him this before the election. He voted for Moore.

Valentine Holt. J. H. Wilson says that he knows Holt does not live in the county of Mercer; that he lives either in Washington or Anderson. His name is on the ——— poll book for Moore, page 5.

David B. Hughes states that he voted for Moore at the last election; that he did not then know that he was under twenty-one; that he is now satisfied, from what his mother has told him, that he is not twenty-one.

John George. It is proved by John Harlan, Andrew G. Kyle, Mathias Stuck, and Griffin Steen, that John George moved to Indiana in October, 1831, for the purpose of settling there; that he sold off his land, took his family and effects with him, and returned, September, 1832, not having been a year in the State next preceding the election. See his own deposition. He voted for Moore, and his vote was not struck off. See, also, the deposition of John Stuck and James C. Clark.

Wesley Lung. T. N. Van Dyke: Lung told me on the last day of the election that he had voted for Moore, and that he was not twenty-one.

Joseph Lillard states that Lung was not twenty-one at the time of the election. Asbury Lillard states that Lung informed him that he had voted for Moore. That his brother-in-law to Lung, father, and mother, both told him he would not be twenty-one against the election. His father is dead.

Thomas Quin. It is proved by Joseph Lillard and Asbury Lillard that he had not been in the State a year before the election; name recorded for Moore.

Andrew Parish. Joseph Lillard proves he was not twenty-one; name recorded for Moore.

David Baggerly and David Baggerly, jr. The testimony of George C. Thompson and Asbury Lillard proves that they



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had not been a year in the State; their names are recorded for Moore.

Lemuel Norton. A. Lillard and Joseph Lillard prove that he had not been a year in the State before the election. Samuel Claunch swears he voted twice at the last election for Moore; once at Perryville, and once at Harrodsburg, and his name is found twice on the poll book for Moore as stated.

Samuel Blades. ——— proves that Blades told him he had voted for Moore at Perryville at the last election, and that he had gone to Harrodsburg, and voted for Moore again by the name of Samuel Sammons.

John Mullins. Samuel Claunch proves that Mullins voted at Perryville for Moore, and went to Harrodsburg, and voted for him a second time.

David Richardson. It is proved by Matthew Stuck, J. Harlan, Andrew G. Kyle, John Stuck, and James G. Clark; that Richardson, in November, 1831, had moved to Ohio, and returned last spring; he moved there to reside; his name is recorded for Moore.

H. N. Horine. H. P. Horine proves that voter was not twenty-one years old; that he told witness he had put twenty-one in his shoes, and swore that he was over twenty-one, but did not swear he was twenty-one years of age.

Richmond West. Daniel Ray states that he saw his name on the poll book for Moore. Walker West proves that his son, Richmond, is not twenty-one, and that report says he voted for Moore.

Hyde Dean. It is proved by one or two witnesses that his father was summoned, and did not attend to give testimony; his father's declarations that he was not twenty-one, and declarations that he had voted, were received, and his name, on this proof, was struck from the list of votes given for Letcher, by the majority.

John Booher. John Y. Jordan swears he summoned the mother of Booher to give testimony as to her son's age; she said he was not twenty-one; that she was in town the day depositions were taking, and did not give her deposition. R. Wheat proves that voter told him he had voted for Moore, and that he was not twenty-one; that his mother refused to give her testimony. The majority of the committee did not strike his vote off, in which we think they erred.

James Nichols. Joshua Nichols proves that voter was his son, and that he was entitled to vote; the majority struck his name from the list of votes given for Letcher. This we think was an error.

Cornelius Dewees was stricken off without any evidence that he voted, except that his name was found on the poll book. His vote was recorded for Letcher. Richard Thompson the witness.

The minority also bring to the notice of the House the

votes of William Baird, William Steen, and John Findley; the two first voted for Letcher, the latter for Moore. Wm. Baird is himself sworn, and in his deposition states that he was born in Ireland; that he was neabeleven yearsold when he came to this country; that he has lived in this country sixteen years; that he never was naturalized; that his father came to America before the last war; he was a corporal in Captain Fowson's artillery, and was killed in the battle near Niagara falls; that he has received a patent for land on account of his father's services; that his uncle told him his father was naturalized; that he came to America after his father died.

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William Steen states that he was born in Ireland, came to Kentucky in November, 1783, has been there ever since; that he was never naturalized, and never supposed there was any need of it, as he helped to make the Government; that he has served the country as a soldier since he came to it; that he was in St. Clair's defeat; that he served under General George Rodgers Clark; that he volunteered and served a campaign in the last war, and that his right to vote was never questioned before by any body.

John Findley. P. G. Rice states that he knows John Findley, and has done business for him for several years; that he has purchased bills from him on Richard Willing, of Philadelphia; deponent understood said bills were on account of a pension coming to Findley from the British Government; does not recollect that Findley ever directly told him so.

Thomas Downton states that he has been and now is the agent of Findley to draw money from Willing, of Philadelphia; has never heard Findley directly say that he was a pensioner of the British Government. His conversation on the subject of the pension which he has been drawing, served to convince him that it was in fact a pension from that Government. Findley has recently told him that he would soon have another draft.

Thomas Downton states that Findley told him he had emigrated from England with the intention to become a citizen of the United States, in the year 1811; that he was naturalized on the 4th of August, 1812, in Philadelphia; that he had lost his certificate. He stated it was true that he was a British pensioner, but that the pension was granted him after he was naturalized. Witness states that he has always been reported to be a British pensioner. Findley told him that on a former occasion he had voted on his own oath: (we believe this conversation was after the election.)

Thomas Downton was sworn again, and states that, since he gave his former deposition, he has conversed with Findley, who told witness that he was satisfied he had no right to vote, because he had only taken the oath of intention, but had never taken the test oath renouncing allegiance to the British Go-

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vernment. That Findley wishes his vote taken off, and not counted. That Findley is sick, and cannot come to give his deposition.

This is the substance of the testimony. The rules which the majority of the committee adopted, and the manner in which they were applied, made the two first illegal votes, and the latter a legal vote. The rules must be illegal, or the application incorrect. It cannot be right that a man, who served this country through all the wars in 1783, faithfully until the present time, enduring hardships and privations which none can estimate but those who endured them, should not have a right to vote; and that a man who is confessedly a British pensioner, should. Baird claimed the right to vote through the qualification of his father, and we think the evidence is strong that his father was naturalized; and even that remained doubtful, as his vote had been received, should be retained.

Archibald Gordon was proved, by his father, John Gordon to be under 21 years of age. He voted for T. P. Moore. His vote was retained.

James S. Hackley proves that Gordon once gave a libel.

Sandford Gordon states that he thinks his brother is but that his father must know his age better than he does.

Charles Utterback. It is proved he came from Indiana the 5th of September, 1832; that he voted for Moore; in August, 1832, he had voted in Indiana. His vote was retained by a majority of the committee. It is proved by his own certificate of the fact. There is proof that he could not attend, on account of sickness, to give his deposition.

John Bond proves that Utterback moved to Indiana three years ago to live, if he liked the country. That he sold off his land before he went there; that he was not in Indiana a year before the election.

John Koiner, who voted for Moore, we think should be stricken off. See the deposition of Moses Hawkins.

William Rew is proved to have resided in Garrard county, voted in Jessamine, as appears by the poll book, for Moore, and the majority decided his vote good. See deposition of Thomas Reynolds, jr.

James Dixon. His vote is proved illegal by the testimony of John T. Hudger and Abner Hamlet. He voted for Moore. His vote was retained by a majority of the committee.

Eli Williams. This name is found in the Andover poll book for Letcher.

Wade Dawson. This name also.

John Wash—, sheriff of the county, says he does not know either of them.

Randall Walker does not know either of the two.  
Dr. D. G. Dedman does not know of them.

On this testimony the majority struck those two names from the poll book.

William Conner. George Smith knows him; that he had been out of the State, but does not know how long.

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Six witnesses swear they do not know him; that his name is not on the tax list, or collector's book. His name is recorded for Letcher. On this testimony his name is stricken off.

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Charles Welsh, Thomas Harris, Montgomery Vanlandingham, Joseph Murrain, Levi Nunnery, John Soofield, Richard Curd, Anderson Hulet, Hickman Evans, Henry Wood, Dudley Hager, Richard White, John Murphy, all voted for Mr. Letcher. These names were also stricken from the poll book by the majority of the committee. The testimony was that their names were not on the tax list, or collector's book; that the sheriff and three or four others did not know them.

The votes of those sixteen persons were stricken off the poll book by the majority, because they were unknown to the witnesses, and because their names were not on the tax list, or collector's book. The tax book is made out between the 1st of January and 1st of May. The names of qualified voters may be omitted. We incline to the opinion that some names are generally omitted through mistake. It is no part of the qualification of an elector that he should either be taxed, or pay tax; but many might come into the county after the list is made out, and before the election. Here is a period of three months or more for people to come into the county, and during this time many young men would arrive at the age of twenty-one. We cannot think the evidence such as ought to justify the committee in striking their names off. The law has placed certain guards to secure against the illegal exercise of the right of suffrage. The court appoints two judges and a clerk; the sheriff is also to attend. If the voter is not known to be entitled by one of these officers, it is their duty to swear them. The presumption is that they did their duty; the proof is positive that these persons were present, and did vote. The record proves it. There is no proof that they are not qualified; the testimony we think the weakest of all presumptions; we cannot entertain a doubt that the committee erred in striking off their names. It is in fact adding, as an additional qualification, that unless the voter is known to the sheriff, or public men, his vote is illegal: this is establishing a principle against the humble and retiring portion of the community, which we think never has, and, we hazard the assertion, never will be received by the people, or established by the Congress of the United States.

The undersigned entertain the opinion that the following named persons should not have been stricken from the list of votes given to Letcher:

*In Mercer county.*

D. D. Miller  
A. W. Buford

Elijah Mounts  
C. Fitzpatrick

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W. R. Porter	Hayden Dean
R. L. Berry	James Nichols
R. McKeown	Cornelius Dewees
G. W. Ormond	W. W. Ewing
B. Leffler	W. Holly

*In Garrard county.*

Huke Huffman	John G. Pond
Paris Conner	Johnston Finnell
Peter M. Brown	William Baird
William H. Kemper	William Steen
Chauncey B. Sheppard	

*In Jessamine county.*

William Conn	Richard Curd
Charles Welch	Anderson Hulet
Thomas Harris	Hickman Evans
Mont. Vanlandingham	Henry Woods
Joseph Murrain	Dudley Hager
Levi Numery	Richard White
John Scofield	John Murphy

*In Anderson county.*

Eli Williams	Wade Dawson
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*In Lincoln county.*

David Swearingen	Cornelius Naves
S. Mitchell	John Paxton

The minority entertain the opinion that the names of the following persons should be added to the list of voters who voted for Letcher:

*In Mercer county.*

John McHan	Jacob Coffman
Reuben Young	William Jenkins
Vincent Inge	Rev. David Robertson

The undersigned entertain the opinion that the following list of persons, who voted for Moore, ought to be stricken from the poll book as illegal voters, in addition to those stricken off by the committee:

*In Garrard county.*

John House	Richmond West
James House	Thomas Williams

*In Mercer county.*

Joseph Wells  
 Harrison Moore  
 Absalom Holt  
 Thomas Wade  
 Valentine Holt  
 David B. Hughes  
 Reuben Lawson  
 Wilkerson B. Horne  
 Thompson Jennings  
 Marshall Haynes  
 Abner Duncan  
 John Sheppard  
 John George  
 Wesley Lung  
 Thomas Quinn  
 Andrew Parish  
 David Baggerly  
 David Baggerly, jr.  
 Lemuel Norton  
 Samuel Claunch  
 Samuel Sammons  
 John Mullins

David Richardson  
 H. N. Horine  
 John Booher  
 John Finley  
 Moses Hann  
 Noah Ware  
 Addison Covert  
 William Godfrey  
 Samuel Black  
 Smith Riley  
 Bryant Royalty  
 Allen Dickey  
 Wm. Cornish  
 Joel Bunton  
 Philip Ellis  
 Robert Jennings  
 Samuel Grimes  
 George Smith  
 Samuel Paddox  
 William Leonard  
 Henry Gibson

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*In Lincoln county.*

W. L. Kenley  
 G. Pollock

Joseph Hanly  
 J. S. Long

*In Jessamine county.*

William Sutton  
 John Koimer

William Rew  
 James Dixon

*In Anderson county.*

Archibald Gordon

Charles Utterback

The undersigned entertain the opinion that the votes of the following persons should be deducted from the number of votes counted by the majority of the committee for Moore :

*In Mercer county.*

John McHan  
 Reuben Young  
 Vincent Inge

Jacob Coffman  
 William Jenkins  
 Rev. David Robertson

The following statement shows the result to which we have come :



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Letcher received in Lincoln	650
Mercer	685
Garrard	1,075
Jessamine	581
Anderson	199
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	3,190
Deduct from Letcher's number of votes as decided bad	38
	<hr/>
	3,152
Add to this the six votes which we think were erased	6
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This we think his entire number of legal votes	3,158
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Moore received in Lincoln	501
Mercer	1,468
Garrard	247
Jessamine	489
Anderson	436
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	3,141
Deduct from Moore's number of votes as decided bad, with the exception of Lewis L. Mason, his vote being in our opinion good,	25
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	3,116
Deduct the six votes erased from Letcher's column and placed in Moore's,	6
	<hr/>
	3,110
Deduct from this the column of votes which Moore re- ceived, and which we think illegal, in addition to those included by the majority,	57
	<hr/>
This being in our opinion his entire legal vote	3,053
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Letcher's vote thus stands	3,158
Moore's	3,053
	<hr/>
	105

Leaving one hundred and five votes of a majority for Letcher.

The minority of the committee differed with the majority as to receiving the declarations of the voters made after the election. The majority excluded after declarations as to his right of suffrage, but received them as to the fact of his having voted. The undersigned could not concur in this distinction, nor in the decisions made in conformity to it.

The minority have thus presented their views. They have given some extracts of the testimony. In taking such a mass as was before them, inaccuracies may have occurred.

In thus presenting their views and opinions, they very much regret the severe illness of their honorable chairman, who they are happy to state concurs in most if not all the opinions they have presented. Prior to the illness with which he is now confined, he had commenced drawing a report setting forth the views of the minority, which he no doubt would have done in a much more clear and forcible manner than has been done by us. The undersigned will add with great pleasure that so far as they have seen individually, or so far as they have learned from the testimony, the conduct of the two contending candidates has been fair and honorable.

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JOHN K. GRIFFIN.

JOHN BANKS.

On the principles assumed by the majority of the committee, as illustrated by their calculations, Mr. Moore was elected by a majority of forty-four votes over Mr. Letcher.

Agreeably to the report and numerical estimates submitted by the minority of the committee, this judgment is reversed, and a plurality of 105 of the legal votes awarded to Mr. Letcher, making the entire difference between the two branches of the committee amount to 149 votes. It became, then, the duty of the House to determine whether they would sanction and adopt the views presented in either report, or whether, rejecting both, they would adjudge the case upon its merits, and the evidence furnished by the respective parties.

The testimony taken by the parties was ordered to be printed; and from the proceedings of the House, it is obvious that an attempt was made to decide the case by it, without a direct reference to the views taken on either side. On various days, from the 13th of May to the 12th of June, the case was under debate. It is not easy, and will not be desirable, to particularize all the motions and resolutions offered to the House during the discussion of this litigated case. Such only as seemed to decide some principle, or such as may be capable of application to future cases, will be noticed.

Proceedings in  
the House.

On the 20th of May, a motion having been made to commit the reports to a Committee of the Whole House, it was rejected, and the first resolution reported by the majority of the committee was taken up for consideration.

Mr. BANKS moved to amend it; and on his motion somewhat modified, it was, on the 4th of June,

“*Resolved*, That all the votes given by qualified voters, which were received in Lancaster, Garrard county, whilst Moses Grant, Esq. acted as one of the judges on the first morning of the election, in August last, and those of a like character given on the second day of the election, in the absence of the sheriff, ought to be estimated in ascertaining the result of the election.”

Mr. Banks's re-  
solution.

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GRANT was appointed by the sheriff to be one of the judges at about nine o'clock in the morning, in the place of William Wheeler, who *failed to attend*. It was objected by the committee, that this appointment was illegal, inasmuch as the sheriff could only appoint, on a failure of attendance of the judges regularly appointed; and that this failure could not appear till the hour arrived for opening the polls, which was ten o'clock. This resolution disposes of the objection, as well as of that which was urged against the votes received on the second day, during the temporary absence of the sheriff.

Decisions of  
the House on  
points ruled by  
the committee.

The votes of the theological students of Centre college, which were rejected by the majority of the committee, on the ground of their not having a legal residence, or *domicil*, in the county in which they voted, were also, on the motion of Mr. BANKS, restored to the lists, and allowed to be counted. Of these, *nine* were for Letcher, and *one* for Moore.

By the testimony, it appears that John McHan and four or five other persons made oath that they voted for Letcher, but that their names were put down for Moore; and the committee, finding their names so entered for Moore, decided to receive them as legal votes for him, in conformity with the rule laid down by them, "that votes recorded upon the poll books as given to one candidate, cannot be changed and transferred to the other by oral testimony." This decision of the committee was, however, overruled by the House, and the votes ordered to be counted for Mr. Letcher.

Another class of votes rejected by the committee, was that of persons whose residence in the county appears, by the depositions of the sheriff and others, not to have been known to them. They were consequently rejected on proof that their residence was *not known* to the deponents. This decision was reversed, and the votes admitted.

On the 10th of June, the matter being still in debate, Mr. POPE, of Kentucky, offered several resolutions, by way of amendment to those previously offered by Mr. BANKS, for the purpose of reducing the votes on Mr. Letcher's poll. Under these resolutions, some votes given by minors were stricken off, and some, it would appear, that had been given by persons not residents of the State. In the course of the investigations on the case, a great variety of questions occurred on individual votes given at the election, and numerous changes in the state of the polls, as reported by the committee, were made. At length, on the 11th of June, Mr. MCKAY, of North Carolina, moved that the report of the Committee of Elections be committed to a Committee of the Whole House, with instructions "to report a resolution for a new election for a member of this House from the fifth congressional district in Kentucky, it being impracticable for this House to determine with any certainty who is the rightful Representative of the said district."

On this motion the following debate occurred :

Mr. GILMER addressed the House in opposition to it, contending that there was no such irregularity or uncertainty as to prevent the House from coming to a just decision.

Mr. WISE replied, and insisted, in a directly opposite view. He had never seen or heard of greater irregularity or uncertainty in any contested election.

Mr. CLAYTON opposed the resolution, and contended that the whole question was a question of law, under the constitution and laws of Kentucky ; and if the present process was permitted to proceed, it might be settled in a few hours.

Mr. ANTHONY despaired of arriving at any conclusion by examining the evidence, and discussing it in the House. He dwelt upon the number and complexity of the questions which had arisen and been decided in the course of the investigation, and declared himself utterly unable to decide on which side those various decisions had thrown the majority of votes. He was, therefore, in favor of the resolution now proposed, and thought it best to refer the whole question back to the people. This course, he thought, would be most satisfactory to the citizens of Kentucky.

Mr. MANN, of New York, deprecating further debate, moved that the House adjourn. *Negatived.*

Mr. ADAMS contended that the adoption of the resolution would be a violation of the constitution, which declared that the House should be the sole judge of the qualifications of its own members. The House was not only *empowered*, but *required* to decide on all questions of contested elections. Nor was he willing, by adopting such a resolution, to stultify the House by its own act. There was no difficulty in the question ; or, if there was, the House had already surmounted it, by deciding on all the questions of principle involved. What remained was easy ; and if the House would only proceed as it had been occupied, they would arrive without difficulty at a just result. And he, for one, was prepared to sit and vote till it should be settled. The difficulty had arisen in a fraud ; and while the Committee of Elections reprobated that act, their report went to carry out all its results. If gentlemen could not decide, (though they had hitherto voted without any complaint of difficulty,) let them be excused from voting. But he thought the case was very simple ; and might soon be settled.

Mr. MCKINLEY replied, denying the House to have been bound by the decisions already made ; each must judge of the whole case for himself, apart from the decisions of others. Some were for a strict adherence to law ; others scouted the idea. The testimony, a great deal of it, was contradictory, and the House would not stultify itself by voting itself to be unable to come to a decision on the evidence before it. Many nice legal questions arose, if the law was to be adhered to. If it was to be disregarded, then other and new

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1st Session.Debate on the  
motion of Mr.  
McKay for a  
new election.

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motion to de-  
clare the seat  
vacant.

Remarks of Mr.  
Binney.

difficulties arose. He contended that no decision the House could come to was likely to do justice to the candidates or to their constituents.

The House had appointed an inquest; and when its return was received, the House had set it aside, and taken the whole case into its own hands. For himself, he admitted that he had the same party predilections which were common to other gentlemen; but he was willing to send the case back, and let the people decide it, either for or against the interests of the party he was attached to, as they might prefer.

Mr. BINNEY, considering this as likely to be the closing argument in the case, held it his duty to offer some remarks upon it. He reprobated the idea of the House declaring that it was impracticable to decide the question. The House was bound to decide: it had all the facilities for decision: and why should it not decide? Could not gentlemen recollect the principles on which they had themselves voted? What if they at times agreed with, and at others differed from, other members: if each pursue the principles he had laid down for himself, whether right or wrong in his rule, he could certainly decide the case. Would gentlemen record it as a fact, that they could not remember their own principles? He never would take refuge from duty in indolence or inconsideration.

The difficulties here were just such as would occur in court if the judges should be all the time talking instead of listening. He had listened to all suggestions on doubtful matters from both sides, and was prepared to decide upon them. Were not the constitution and law of Kentucky accessible? Were any materials for decision wanting? The members were supposed to have the requisite knowledge; and he did not doubt they had. Argument had a convincing force, and it elicited truth: it often satisfied gentlemen that the opinion it was brought to sustain was indeed false: no matter: so much was gained to truth. Whoever declared himself unable to judge, stultified himself. No case could be more simple in its principles, however numerous might be the votes to be examined. If it should be established, that, where disputed votes were numerous, the House could not decide, any artful man might defeat his antagonist by multiplying such disputes. Were the votes illegally received, or illegally rejected? That was the first question. There was some weight in the polls; and unless it was counteracted by evidence, the polls must stand. If evidence was brought to counteract them, that evidence must be judged of as it was elsewhere—as it was daily judged of in the courts of justice; and when it had been weighed on both sides, the scale preponderating must be allowed to preponderate. The labor might be large, but industry would surmount it: and the duty of the House compelled them to

undergo it. How could they say it was impracticable? Gentlemen of opposite views had examined the whole testimony, and given the results of their investigations to the House. The House could hear both, and judge between them. He should blush to vote for a resolution in the form of that now proposed to the House.

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Mr. SUTHERLAND professed himself to be ready to meet the question at all times. Yet he was in favor of the resolution. The House would not be stultified by adopting it. He was willing to seek refuge nowhere but where honor led, and that was in the judgment of the people. They were the highest and best power to settle the question. They knew the parties and all the witnesses. Two brothers called Horine swore opposite to each other; the House could not judge between these Horines, but the people could. In Massachusetts they sent back elections to the people again and again, till a decision was had. No doubt there would be great excitement, but no injury would follow. Many minors would have come of age on both sides. The candidates were both honorable men, and not afraid to face their constituents. As to going through a book of evidence of 1,100 pages, and weighing both sides at this late hour, it was out of the question. Let the candidates go back, from county to county, and stump it together.

Mr. WISE said the uncertainty in this case did not lie in the constitution or the laws, but in the *facts* of the case. Upwards of six thousand votes had been polled, and yet the question was reduced, according to some gentlemen, to a difference of twelve disputed votes. And, even as to the Kentucky law itself, there was not absolute certainty: a new law had reached the House this day, which had never been heard of before. But this aside, there was a mass of conflicting testimony, which rested on comparative credibility, of which the House could not judge. The most certain, the most proper, the most republican mode to settle the question, was to send it back to the people.

Mr. LINCOLN repudiated the idea of the decision being impracticable, or even difficult. All that was to be done was to lay down a just principle, and then try the items of evidence by it. A great outrage had been committed on the people and laws of Kentucky, and it was the duty of the House to vindicate those rights. Would the House consummate the very object in view of that sheriff who had fraudulently withheld the poll book? Would they become instruments to effect his purpose, which was to defeat the election of Mr. Letcher? The House was bound to teach a lesson on that subject which should prevent the repetition of such an outrage.

The motion of Mr. McKAY passed in the affirmative by a vote of 113 to 109, and on the 12th of June the Committee of the Whole House reported a resolution in conformity with

Motion carried.



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the instructions so given. Pending the consideration of this resolution, Mr. CLAYTON, of Georgia, moved to amend it by striking out all after the word *resolved*, and inserting the following, viz.

Motion to admit Mr. Letcher.

“That Robert P. Letcher is entitled to a seat in this House, as a Representative from the fifth congressional district of Kentucky.”

The question on this amendment was decided in the negative: Yeas 112, Nays 114.

On a recurrence of the question on the resolution reported by the Committee of the Whole House, Mr. J. Q. ADAMS moved to amend it by striking therefrom these words: “it being impracticable for this House to determine with any certainty who is the rightful Representative of the said district;” which words he declared to be unnecessary, dishonorable to the House, and inconsistent with previous decisions of the House, made in this case.

The amendment was rejected.

The resolution reported by the Committee of the Whole House was in these words:

Motion for a new election.

“*Resolved*, That there be a new election for a member of this House from the fifth congressional district in Kentucky, it being impracticable for this House to determine with any certainty who is the rightful Representative of said district.”

To this resolution, Mr. CLAYTON, of Georgia, moved that the following preamble be prefixed:

Mr. Clayton's preamble.

“Whereas, by the returns of the election for a Representative of the fifth congressional district in the State of Kentucky, it appears that Robert P. Letcher had a majority of *forty-nine votes*; that the said election was contested by T. P. Moore, and the Committee of Elections, to which the same was referred, reported to this House that there was an election, and that T. P. Moore was elected by a majority of 44 votes of all the legal votes in said district. And whereas this House, by sundry resolutions, has added to and subtracted from the votes of each party, in the following manner, to wit:

From the majority as reported by the committee, viz. 44  
They have restored the votes given on the first day before Grant—

To Letcher,	. . . . .	22	
Moore,	. . . . .	3	— making majority 19

(Ought to be 25,) 23

They have restored the votes on the second day in the absence of the sheriff, . . . . . 45

To Letcher,	. . . . .	32	
Moore,	. . . . .	13	— making majority 19

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Restored to Letcher the votes of the theological students, . . . . .	9	
Moore, . . . . .	1	
—		8 Debate continued.
Making Letcher's majority,		2
Restored to Letcher the Salvisa vote, which had been taken from him and given to Moore, . . .	5	
Taken from Moore the same, . . . . .	5	
—		10
		12
Restored to Letcher the votes of Jessamine, . . .	3	
—		15
Taken from Letcher on Mr. Pope's amendment, June 10, . . . . .	5	
—		10
Do. do. June 11, . . . . .	4	
—		6
Taken from Moore on Mr. Marshall's amendment, to be added to Letcher, . . . . .	5	
—		11

Whereby it appears that Robert P. Letcher received a majority of eleven votes of all the legal votes in said district.

“And whereas it appears, by motions now pending before this House, that sundry other votes are yet in controversy between the parties, and the House having stopped the investigation upon those votes which were alleged to have been illegally received by T. P. Moore.”

Mr. MARDIS inquired if it was in order for him to move to lay the proposition of the member from Georgia (Mr. CLAYTON) on the table; as, if it was, he should submit that motion; not, however, because he dreaded any effect from the paper itself, but that he considered the proposition itself a direct insult upon the majority of the House.

Mr. CLAYTON. The gentleman from Alabama (Mr. MARDIS) says my amendment is an insult to the majority of the House. Sir, it is the first time, among honorable men, that I ever heard that the truth was offensive. My amendment contains an accurate history of the facts of the case, as they appear on the records of the House, and, consequently, is the truth, the whole truth, and nothing but the truth; and, if that is insulting to the gentleman, I would hope he is the only one in the House that would be insulted by that virtue. I regret that it should hurt his feelings; but, I repeat, I trust no other member will consider it an annoyance.

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A new election  
ordered.

Mr. CLAYTON then withdrew his motion [to affix the said preamble,] but it was renewed by Mr. GARLAND, and decided in the negative : Yeas 72, Nays 136.

The question was then taken on the resolution submitted by the Committee of the Whole House, and it passed in the affirmative : Yeas 114, Nays 103. And it was consequently determined that there be a new election ; “ it being impracticable for the House to determine with any certainty who is the rightful Representative.”

# CASES OF CONTESTED ELECTIONS

IN SENATE OF THE UNITED STATES.

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## THIRD CONGRESS—FIRST SESSION.

### CASE I.

**ALBERT GALLATIN, of Pennsylvania.**

[Mr. G. a native of Geneva, emigrated thence, and came to Boston in 1780; in 1783, he removed to Pennsylvania, and in the same year to Virginia, where he purchased a large tract of land, and took an oath of allegiance to the said State. In December, 1785, he purchased an estate in Fayette county, Pa. where he has ever since resided. On the 28th of February, 1793, he was elected from that State to the Senate of the United States. It was determined that he was not entitled to his seat, not having been "nine years a citizen of the United States."]

DECEMBER 8, 1793.

The Vice President laid before the Senate the petition of Conrad Laub and others, relative to the appointment of the Hon. Albert Gallatin a Senator of the United States; which was read.

*Ordered*, That this petition lie on the table.

DECEMBER 11.

On motion,

*Ordered*, That Messrs. RUTHERFORD, CABOT, ELLSWORTH, LIVERMORE, and MITCHELL be a committee to take into consideration the petition of Conrad Laub and others, stating Charge against that the Hon. Albert Gallatin, at the time he was elected Mr. Gallatin. a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the constitution, and report thereon to the Senate.

DECEMBER 30.

Mr. RUTHERFORD reported from the committee to which was referred the petition of Conrad Laub and others; which report was read, and ordered to lie for consideration. The report was as follows:

"The committee to which was referred the petition of Conrad Laub and others, stating that the Hon. Albert Gal-

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Report of the  
committee to  
which the pe-  
tition was re-  
ferred.

latin, at the time he was elected a Senator of the United States, had not been nine years a citizen of the said United States, as is required by the constitution, report :

“ That the committee have conferred with Michael Schmyser, agent for the petitioners, and with Mr. Gallatin ; that Mr. Schmyser has declared that the petitioners were ready to adduce proofs in support of the petition, at such time as the Senate may think proper to appoint ; that Mr. Gallatin states no objection to the trial’s commencing at an early day. The committee therefore recommend that the Senate agree to the following resolution :

“ *Resolved*, That ——— be assigned for hearing the petition of Conrad Laub and others, respecting Mr. Gallatin’s right to a seat in the Senate, and that Messrs. Gallatin and Schmyser be furnished with a copy of this resolution.”

On motion, it was agreed to postpone the report of the committee, to take into consideration the following resolution :

Mode of pro-  
ceeding sug-  
gested.

“ *Resolved*, That a Committee of Elections, to consist of seven, be appointed to report rules for receiving petitions and conducting inquiries relative to the qualifications of a Senator, and that the petition of Conrad Laub and others be referred to the same committee, to state the facts, and that they be authorized to send for persons and papers.”

On which a motion was made and seconded, to postpone this motion, and to take up the following :

Further propo-  
sition as to the  
mode of pro-  
ceeding.

“ That ——— be a committee to ascertain and state to the Senate the facts relative to the time when the Hon. Albert Gallatin became a citizen of the United States, and that the said committee have power to send for persons and papers.”

Whereupon, a motion was made and seconded, to postpone the preceding, and to take into consideration the following motion :

“ *Resolved*, That a Committee of Elections be appointed, and that the petition of Conrad Laub and others be referred to it, to report their opinion on the merits of the said petition.”

And, after debate, the Senate adjourned.

JANUARY 13, 1794.

On motion,

A Committee  
of Elections  
appointed.

“ *Ordered*, That a Committee of Elections, to consist of seven, be appointed, and that the petition of Conrad Laub and others be referred, without prejudice to any question which may, upon the hearing, be raised by the sitting member, as to the sufficiency of the parties and the matter charged in the petition, to the same committee, to state the facts, and that they be authorized to send for persons and papers ; also, that Messrs. BRADLEY, ELLSWORTH, MITCHELL, RUTHERFORD, BROWN, LIVERMORE, and TAYLOR be this committee.”

FEBRUARY 10.

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Mr. BRADLEY, from the Committee of Elections, made report as follows:

"The Committee of Elections, to which was referred the Report of the petition of Conrad Laub and others, against the election of the Hon. Albert Gallatin, as a Senator of the United States for the State of Pennsylvania, report:

Committee of Elections.

"That they have had the same under consideration, and having given due notice, as well the petitioners, by their agent, Michael Schmyser, as the said Mr. Gallatin, appeared before them, and, on the part of the petitioners, the following evidence was produced, to wit:

"Robert Morris, Esq., being duly sworn, deposes that during the war two of his sons went to Geneva for their education, and at that place they became acquainted with some of the friends of Mr. Albert Gallatin, who had gone to America, and they, being solicitous to hear of his safety, desired Mr. Morris's sons to write to their father to make inquiry and give the information he should obtain. That frequently afterwards he received letters for Mr. Gallatin from Europe, which he always supposed to come from the friends of Mr. Gallatin in Geneva. He supplied Mr. Gallatin with money for a bill upon London, and then supposed the funds to pay the same were remitted from Geneva. Mr. Morris paid Mr. Gallatin about one thousand guineas, by order of Messrs. ——— & Co., bankers in Paris, believing always that they were reimbursed from Geneva. Mr. Morris does not recollect dates, not having for a long while seen any of the letters that passed on the subject. He does not know the place of Mr. Gallatin's nativity, but, from the general course of the circumstances which came under his observation, he always did suppose he was born in Geneva.

Evidence taken by the committee.

"Sworn to and subscribed, January 22, 1794."

"Nathaniel Cabot Higginson, Esq., being duly sworn, deposes that he does not know directly any thing of Mr. Gallatin's being a foreigner, or native; that he recollects knowing him by reputation and sight at Boston, in one of the years 1781, 1782, or 1783, and that he was generally reputed to be a foreigner. This deponent believes that Mr. Gallatin then taught the French language, and did not speak the English with facility, and further recollects that Mr. Gallatin was resident there or thereabouts a considerable time. This deponent further says that he never had any conversation with Mr. Gallatin, but founds his belief with respect to Mr. Gallatin's not speaking the English with facility, on the information received from others.

"Sworn to and subscribed, January 22, 1794."

"Mr. John Breakhill, being duly sworn, testifies that, last winter, being a member of the Legislature of Pennsylvania, previous to the election of Senator for the State of



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Report continued.

Evidence reported by the committee.

Pennsylvania, I heard Mr. Gallatin say his citizenship would not admit his being a Senator. What were his reasons for making the declaration, I cannot say; I took it he did not wish to be elected. This declaration by Mr. Gallatin was made at a meeting of a number of members of the Pennsylvania Legislature, held for the purpose of agreeing who should be set up as a candidate. The deponent further says that he does not recollect Mr. Gallatin's assigning any other reasons for his backwardness to serve as a Senator, than the want of citizenship.

"Sworn to and subscribed, January 22, 1794."

"Henry Kammerer, Esq., being duly sworn, testifies that, last winter, being a member of the Legislature of Pennsylvania, and previous to the election of Senator for the said State, at a meeting of a number of the members of the State Legislature, to agree upon a candidate to fill said office, I heard Mr. Gallatin say, when his name was proposed, 'As for my name, it is out of the question; I have not been a citizen long enough to entitle me to serve in that station.' That, at a second meeting for the same purpose, Mr. Gallatin was again proposed as a proper person for a candidate, and then this deponent understood (not from Mr. Gallatin, but from some of the members of Assembly then present,) that the doubt about his citizenship was then put to rights, and then it was almost unanimously agreed to put up Mr. Gallatin's name; that, on the morning succeeding Mr. Gallatin's election, the deponent heard it observed that, notwithstanding Mr. Gallatin's election, he could not take his seat, in consequence of his declaration that he had not been long enough a citizen; that he, the same day, mentioned this to Mr. Gallatin, who said that he had made this declaration under a mistaken idea that it was necessary for him to have been nine years a citizen of the State of Pennsylvania, but that, upon examining the constitution, he had found that to have been nine years a citizen of the United States was sufficient, and that he had been above nine years a citizen of the United States, or words to that effect.

"Sworn to and subscribed, 22d January, 1794."

"Pelatiah Webster, being duly sworn, testifies that, eleven years ago last summer, I let my house in Philadelphia to Mary Lynn, who proposed to take lodgers; I reserved apartments for myself, and boarded with her. Soon after, Mr. Savary and Mr. Gallatin took lodgings of her, and continued a number of months there. Mr. Savary spoke no English; Mr. Gallatin spoke good English, and served as interpreter for him. They appeared to be well-bred gentlemen, and their conduct was agreeable and conciliating, and they soon gained the esteem and respect of the family. I do not know that they ever declared their country, but we all supposed they were French, and, of course, the people, customs, and country of France often made the topic of fireside chat.

In one of those transient conversations, Mr. Gallatin took occasion to say that his knowledge of French affairs was not very perfect, for he was not a native of France, nor had he ever resided long in that country, but was from Geneva. No one interesting circumstance made any further inquiry necessary, nor do I recollect that he made any more explanation of the subject.

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Report continued.

Evidence.

"N. B. Mr. Gallatin once said that his original name was not Gallatin, but, I think he said, was Sidney; but this conversation was in drollery, and not in earnest, as I conceived, at the time of speaking, from the manner and air of his speaking thereon.

"Sworn to and subscribed, 28th January, 1794."

"Mr. John Smilie, member of the House of Representatives of the United States, being sworn, saith that at a meeting of sundry members of the Legislature of Pennsylvania, previous to Mr. Gallatin's election as a Senator of the United States, that gentleman was mentioned as a proper person to fill that office, at which time Mr. Gallatin started some doubt respecting his being qualified, but in what words the deponent does not recollect.

"That the deponent did not understand upon what the doubt was founded, though he thinks, from something said by Mr. Gallatin, that it related to Mr. Gallatin's citizenship; for, as the deponent conceived the conversation proceeded from that kind of modesty which gentlemen usually feel upon having their names proposed upon such occasions, he did not pay much attention to it; and that his reason for forming this opinion was his having frequently observed gentlemen to make excuses in similar situations, and from his knowledge of Mr. Gallatin's modesty of disposition. When being asked if he had ever heard Mr. Gallatin say that he had not been a citizen of the United States nine years previous to his election, the deponent replies, he never did. Upon being asked by Mr. Lewis, counsel for the petitioners, what he had ever heard Mr. Gallatin say touching his citizenship, the deponent replies, that a considerable time subsequent to Mr. Gallatin's election, Mr. Gallatin, in conversation with the deponent, expressed an opinion that he was qualified with respect to citizenship. What else did you ever hear Mr. Gallatin say with respect to his citizenship? The deponent answers that he recollects having heard him say something with respect to the laws of Massachusetts not requiring an oath of allegiance, at the time of his giving his opinion as aforesaid. Did you ever hear Mr. Gallatin say he was born in Europe? The deponent replies, that he does not recollect Mr. Gallatin's saying that he was born in Europe, but that he has heard Mr. Gallatin speak of himself as a Genevan, mention his family in Geneva, and in conversations with him hath always understood him to be of Geneva. Did you ever hear Mr. Gallatin mention the time

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Report conti-  
nued.

of his coming to America? He replies, that he thinks Mr. Gallatin, about a year past, mentioned that he had been then thirteen years in this country, and that he was nineteen years old when he came. Did you ever hear Mr. Gallatin say when or where he took the oath of allegiance? He replies, he heard Mr. Gallatin say that he took the oath of allegiance in Virginia, but, as to the time, the deponent cannot be precise, but he thinks, if he can recollect, that Mr. Gallatin did mention to him, though he cannot be certain, that it was not nine years before he was elected. That the deponent thinks Mr. Gallatin's doubts respecting his citizenship were founded on this ground, the witness referring in this part of his testimony to the meeting before mentioned, when these doubts were expressed; but he cannot specify the time of Mr. Gallatin's having mentioned to him the circumstance of his having taken the oath of allegiance.

"Sworn to and subscribed, January 28, 1794."

"Mr. Thomas Stokely, being sworn, deposeth and saith that, some few days before a Senator was chosen for the State of Pennsylvania, a meeting was held to fix on a proper person to represent the State in that office; sundry persons were started as candidates, among whom was Mr. Gallatin, who, upon his being named, observed that there were many other persons more proper to fill that office, and also observed that there might be doubts as to his citizenship, though the deponent, from the length of time, and not expecting to have been called upon, retains too slight an impression of what then passed, to be able to recollect the words with precision. That, at a subsequent meeting for the same purpose, Mr. Gallatin was finally agreed to be nominated, and the deponent heard no objection thereto, either by Mr. Gallatin (who was present) or any other person.

"Sworn to and subscribed, February 1, 1794."

"The before recited evidence being introduced and closed on the part of the petitioners, Mr. Gallatin was asked whether he had any testimony to produce on his part, to which he gave the following answer in writing, to wit:

Mr. Gallatin's  
reply.

"The committee to which the petition of Conrad Laub, &c. was referred, having informed me that the petitioners had closed their evidence, and asked me, 'whether I had any testimony to produce on my side,' I answer, that it appears to me that there is not sufficient matter charged in the petition, and proved by the testimony, to vacate my seat, and that, by the resolution appointing the committee, the petition is referred to them to state the facts, 'without prejudice as to any questions which may, upon the hearing, be raised by the sitting member, as to the sufficiency of the parties, and the matter charged in the petition;' that, upon the hearing, and in the present stage of the same, the question as to the sufficiency of matter, as above stated, is raised by me; that I conceive, from the evident construction of the resolution,

I have a right to have that question decided by the Senate; that, until the same shall have been decided, I do not wish to be at the trouble and expense of collecting evidence at a great distance; and, therefore, that at present I do not mean to produce any testimony, reserving, however, to myself the right, which I conceive I have, to produce any testimony in my favor, after the said question shall have been decided by the Senate, in case it is decided against me.

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Reply of Mr.  
Gallatin.

“ALBERT GALLATIN.

“Which being duly read and considered, the committee came to the following resolution, to wit:

“Whereas the evidence on the part of the petitioners having been closed, and it appearing that Mr. Gallatin was an alien in 1780, and his answer in writing assigning reasons why he should not adduce evidence on his part, in the present stage of the inquiry, not being, in the opinion of the committee, sufficient:

“*Resolved*, That, in the opinion of the committee, it is now incumbent on Mr. Gallatin to show that he has become a citizen of the United States, and when.

Opinion of the  
Committee of  
Elections.

“Which resolution being read to Mr. Gallatin, he informed the committee that he should rely on the answer he had before given. All which is respectfully submitted to the honorable Senate by the committee.”

And subjoined is the statement of facts exhibited by Mr. Gallatin, and agreed to, between him and the counsel for the petitioners, as mentioned, the 20th instant.

“Albert Gallatin was born at Geneva on the 29th day of January, 1761. He left that place for the United States, in April or May, 1780; arrived in Boston (Massachusetts) on the 14th of July of the same year, and has ever since resided within the United States. In October, 1780, he removed from Boston to Machias, in the province of Maine, in which place, and its neighborhood, he resided one year, and commenced a settlement on a tract of vacant land. During that time he furnished, out of his own funds, supplies amounting in value to more than sixty pounds, Massachusetts currency, to Colonel John Allen, who was the commanding officer stationed there, and also superintendent of Indian affairs for the eastern district, for the use of the American troops, and on several occasions acted as a volunteer, under the same officer's command. For the supplies, he received, one year after, a warrant on the Treasury of the State of Massachusetts, which he sold at a considerable depreciation. In October, 1781, he returned to Boston; and, in the spring of 1782, was, by a vote of the corporation of the University of Cambridge, (otherwise called Harvard College,) chosen-instructor of the French language in the said university. By the same vote he was allowed a room in the college, the privilege of the commons at the tutor's table, the use of the

Statement of  
facts agreed to.

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facts agreed to  
by parties.

library, and also the right of having his pay (which depended on the voluntary subscription and attendance of the students) collected by the steward of the institution, together with the other charges against the students for board and education. Those terms he accepted, and remained in that station for the term of one year. In July, 1783, he removed to Pennsylvania, and in November of the same year proceeded to Virginia, in which State he had purchased more than 1,000 acres of land (and amounting to more than one hundred pounds, Virginia currency, in value) some time between July and November, 1783. Between this last mentioned period and the month of October, 1785, he purchased other lands in the said State, to a very large amount, and in the said last mentioned month he took an oath of allegiance to the said State. In December, 1785, he purchased the plantation in Fayette county, in Pennsylvania, on which he has lived ever since. In October, 1789, he was elected member of the convention to amend the constitution of Pennsylvania, and in October, 1790, 1791, and 1792, he was elected member of the Legislature of the same State. On the 28th February, 1793, he was chosen Senator to represent the said State in the Senate of the United States, and took his seat in December following."

The Senate adjourned to 11 o'clock on Monday morning.

On motion,

*Ordered*, That Wednesday next be assigned to take the foregoing report into consideration, and that in the mean time it be printed for the use of the Senate.

#### FEBRUARY 11.

A motion was made that the petition of Conrad Laub and others, citizens of Pennsylvania, stating that Albert Gallatin had not been more than eight years a citizen of the United States at the time of his election as Senator, is sufficient, as well in respect to the competency of the petitioners, as in respect to matter alleged in the petition, to authorize the Senate to inquire and decide whether the said Albert Gallatin had been a citizen of the United States the term of years required by the constitution as a qualification to be a Senator of the United States.

*Ordered*, That this motion lie until to-morrow.

Upon a motion made yesterday, it was

*Resolved*, That the doors of the Senate be opened and continue open during the discussion upon the contested election of Albert Gallatin.

The report and evidence submitted by the committee being before the Senate for consideration; the following debate ensued, and is copied as reported in Brown's Daily Advertiser of the 24th of February, 1794, printed at Philadelphia.

FEBRUARY 20.

1793.

3d CONGRESS,  
1st Session.

Agreeably to the order of the day, the Senate commenced the trial of the contested election of Albert Gallatin, one of the Senators from the State of Pennsylvania. On this occasion the doors of the Senate chamber were thrown open, and free admission given to spectators, which enabled us to be present, and to make some notes of the proceedings.

Debate on the  
report and evi-  
dence.

The report of the committee, heretofore made, states the evidence taken, and concludes with an opinion that, to controvert the allegations set forth in the petition against Mr. Gallatin, it lies with him to prove his citizenship.

Accordingly Mr. Gallatin presented a written statement of facts, which the President of the Senate read. It contained a narrative of several transactions, from the time of Mr. Gallatin's arrival in the province of Maine or Massachusetts about thirteen years ago; of his having contributed money and his own services, as a volunteer in the cause of the revolution; of his having taken oaths of allegiance, and purchasing lands in that State, and also in the State of Virginia. In the back parts of the last mentioned State, he had formed an interesting settlement, and had been extremely useful in bringing settlers from Europe. The dates of those transactions, and time of his arrival in Pennsylvania, and of his being sent to the State convention, are also recited, up to the time of his being chosen one of the representatives in the Senate of the United States.

Mr. Gallatin's  
statement read.

After the President had done reading the statement of facts, Mr. Gallatin addressed the Senate, by observing that he felt himself rather in an awkward predicament, not knowing whether the counsel for the prosecutors, or himself, were the proper person to speak first, as this preliminary was not yet laid down by the Senate, neither had he provided any counsel. He should have supposed himself in the situation of a defendant, were it not that the weight of proving the affirmative, in regard to citizenship, had been laid on him, under which predicament, it might, perhaps, be necessary for him to begin, and after the counsel for the petitioners had spoken, that he should then be allowed to close the arguments.

His remarks.

Mr. LIVERMORE was of opinion that the sitting member should begin the debate, as the *onus probandi* lay with him.

The counsel for the petitioners, Mr. LEWIS, rose. He was attended by Mr. Schmyser, one of the members of the Senate of Pennsylvania, who, we understand, manages the prosecution on the part of the petitioners. Mr. LEWIS hoped that he would be permitted to say a few words, in this early stage of the business, in regard to the manner of conducting it. He recapitulated sundry offices and posts of honor that had been conferred on him, from which he humbly presumed he had gained much experience, and particu-



1793.  
3d CONGRESS,  
1st Session.

Debate continued.

Quere as to  
who was to  
open the case.

larly in cases of contested elections. He would, therefore, beg leave of the honorable Senate to offer an observation, before they should determine on the mode of conducting the trial. When the question for postponement, which was debated the other day, was before them, the sitting member did then consider himself as defendant, and for an hour had fought phantoms of his own imagination; but now he has changed his ground, and desires to have the privilege which belongs to the petitioners only, namely, the right of opening the prosecution, and afterwards closing the arguments.

Mr. GALLATIN submitted to the decision of the Senate, and said he did not wish to contend for mere matters of form.

A member of the Senate, we believe it was Mr. MARTIN, of North Carolina, thought it immaterial who began, or who concluded, if, in the end, the Senate should be enabled to arrive at a just degree of information.

Mr. JACKSON, from Georgia, made some observations on the manner of conducting the business. He thought it would be incumbent on the counsel for the petitioners to prove that Mr. Gallatin was not a citizen, &c.

Mr. KING, from New York, and some other gentlemen of the Senate, said a few more words on the motion, and it was agreed that the sitting member should begin.

Mr. Gallatin  
opens.

Mr. GALLATIN accordingly rose, and recapitulated the facts stated in the written paper which had been presented to the President, commenting on each of them as he proceeded. He proved that he had been an inhabitant of the United States for thirteen years, and was one before the peace of 1783, and before the confederation. He quoted the laws previous thereto, respecting aliens, and also the British statutes; and he maintained that they were all done away by the revolution. He conceived himself a citizen, in common with other citizens of the United States, from the time of his first qualifying, after his arrival and attachment to the country. The narrowness of our limits prevents us going more minutely into Mr. Gallatin's reasoning. We can only observe that he concluded here, by saying he would reserve the remainder of his defence until he should hear the counsel for the petitioners.

Mr. Lewis for  
the petitioners.

Mr. LEWIS commenced his speech, by observing that he appeared there on behalf of Conrad Laub and other respectable men, who complained of the unconstitutionality of admitting Mr. Gallatin to a seat in the Senate. He was glad to find, by the gentleman's expressions, that the ground of debate had been narrowed into so small a compass, and he would therefore take him up from the argument where he had left off speaking, that of his being a citizen in common of the United States, from the time of his qualifying in Massachusetts, or Virginia. But in Virginia two oaths are required, and they must be made in a court, not before a

magistrate, to entitle a man to citizenship. He must also be possessed of a certain quantity of property, and be a resident for two years. It appears that Mr. Gallatin did not remain in Virginia more than two months. [Here Mr. L. read the Virginia law, of 20th October, 1783.] On this law Mr. L. argued that Mr. Gallatin had not gone through the necessary qualifications, to entitle him to citizenship there; and he observed that he admired the gentleman's candor in not insisting on it here. In this State he had certainly not qualified himself agreeably to law. Under these circumstances, Mr. L. said he never could, for his part, admit the gentleman's right to citizenship, so far back as to entitle him to the suffrage of a vote for a seat in the Senate, &c.

1793.  
3d CONGRESS,  
1st Session.

Debate continued.

Speech of Mr. Lewis, counsel for the petitioners.

The mischievous consequences of permitting such innovations, he represented in strong terms; and he called to the recollection of the House the conduct of ancient and modern Governments on this question. One of the ancient republics made it death for an alien to intermeddle in their politics. The sentiments of antiquity, and those of men in modern days, proved the justice of these conclusions.

With regard to the arguments of the gentleman respecting his being entitled to be a citizen of the Union, or of any individual State of it, because he had qualified himself to be a citizen of one of them, Mr. L. said that was a mere bubble, for surely the gentleman was not one of the mass of citizens at the accomplishment of independence.

The doctrine of the old law, which the gentleman says was done away, in respect to aliens, by the revolution, may have been so with regard to the British King; it was, however, still virtually in force, against the gentleman. But supposing it to be done away, how does the constitution of the different States stand on this head? Is it not implied by all of them, that certain oaths, residence, and property make the proper requisites to form citizenship? In Massachusetts, a foreigner is not a citizen unless he complies with those terms. [Here he quoted page 70 of the small volume of the Massachusetts laws.] He also cited the act in favor of John Jarvis and others; also pages 104, 191, 192, of the same book. From these, he maintained that no such wild idea was ever contemplated by the laws of Massachusetts or Virginia, as to admit foreigners, or persons from other States, to citizenship immediately on their entrance within their limits.

The situation of the sitting member with respect to the constitution and laws of Pennsylvania, he had little doubt, was similar to what he had mentioned in regard to other States, although he would not assert it as a fact. He read the 42d section, and also in page 43, of the law of Pennsylvania, of the 13th of March, 1789, a *proviso*, which contains some precautions, requiring the records to be kept by the master

1793.  
3d CONGRESS,  
1st Session.

Debate continued.

Speech for the  
petitioners.

of the rolls, of the persons admitted to citizenship. The same principle pervades all the States, as well as it does the constitution of the United States. The absurdity of applying it in any other sense was severely pictured by Mr. L., and to admit the idea advanced by the sitting member, was as inadmissible as it was novel. In support of what he wished to impress on the minds of the Senate, Mr. L. quoted the first volume of the journals of Congress, in 1774 and 1775, pages 28 and 29. He then recurred to Blackstone, vol. 1, pages 68 and 64.

It was not his intention to quote the parliamentary laws of England in support of any thing, but such parts of their common law as could not be got over; that common law of England which was imported by our ancestors, and handed down to them by the people, and not the Parliament. The people had made the common law from time to time. The Saxons, Normans, &c. were all concerned in making and improving it, until it had finally reached that degree of perfection in which it was given to us by our ancestors, and it was founded in wisdom and justice.

Mr. L. next quoted 1st Blackstone, 402, which was one of the British laws that had never been admitted into this country, and which he hoped never would be, viz. that wherein the distinction is drawn between the commoner and the peer, an oath being required of the commoner upon all occasions, and no more than "*upon my honor*?" from a peer, excepting giving evidence in civil or criminal trials.

Mr. L. concluded by saying that the difficulties which stood between Mr. Gallatin and his seat were insurmountable; and could not be removed without showing a law of Massachusetts or Virginia, repealing those laws, in regard to the qualification of citizens, which he had mentioned; but which repeal, he was certain, did not exist. He, therefore, contended that to insist upon the gentleman's right to a seat was both novel and absurd. These were his opinions, which he had given in a perfectly extempore way, not having been allowed time, nor expecting to meet the subject on the new ground which it had this day taken in the Senate.

Mr. GALLATIN said he would pledge himself to the Senate to prove that the grounds of his arguments, and his construction of the confederation and laws of the States, were neither novel nor absurd, except in Mr. Lewis's construction of them, but had been admitted in many instances.

However, as the common law of England was now introduced by Mr. Lewis, which was new ground to him, and as the hour of adjournment was nearly approaching, he would beg leave to make his reply to-morrow.

On motion, the further consideration of the subject was postponed till to-morrow.

FEBRUARY 21.

1793.

3d CONGRESS,  
1st Session.

Mr. GALLATIN commenced his defence by laying down the principles on which he intended to argue. It was a very serious situation, he said, for a person to be placed in, who had been so long in America, and who had mingled with the inhabitants in the common cause, that he should afterwards be called upon, before so solemn a tribunal, with an intention to wrest from him his right of citizenship. He confessed that on this occasion his feelings were deeply interested, particularly as the manner of the counsel for the prosecutors was so personal, and went not only to deny him a seat in the Senate of the United States, but even to contest his citizenship, and denounce him as an alien. Debate continued.

Reply of Mr.  
Gallatin.

This was a matter of consequence to many thousands as well as himself, who have long considered themselves in possession of all the privileges of denizens, and yet may be deprived of their rights, if the doctrines of the counsel for the prosecutors should obtain any sanction from the body who were now to judge of its merits.

Mr. G. entered into a series of observations on the various points of law, &c. which had been adduced by Mr. LEWIS, and he particularly remarked that the common law of England was entirely inapplicable to the subject under consideration. He read the laws of Virginia respecting naturalization, from which he insisted that he had long since become a citizen of the United States; he also quoted 1st Blackstone, page 374, and Viner's Abridgment, vol. 2, page 266, respecting the different acceptations of denizen and citizen, and he went back as far as the British statutes of 1740, to show that the intention of the old Government was to naturalize all persons who would go and reside in the colonies. He next mentioned the act of Pennsylvania, of 31st August, 1778, and commented on the principles generally entertained by most writers on the subject of allegiance and citizenship.

An alien is a man born out of the allegiance of the King; but allegiance in England is not an allegiance to the country or to society, as it is understood in America.

In order to explain the principle of reciprocity, he observed that when the two crowns of England and Scotland were united under James, the inhabitants of Scotland became naturalized in England, as if they had been natural born subjects of that country. The allegiance in Britain was personal to the King, and it has there this remarkable quality, that, by the British laws, allegiance can never be shaken off.

This country, (America,) before the revolution, owed allegiance to the King, but that was destroyed by the declaration of independence, and then the inhabitants of the States became mutually citizens of every State reciprocally; and they continued so until such time as the States made laws of their own afterwards respecting naturalization.

1793. As soon as separate Governments existed, allegiance was  
 3d CONGRESS, due to each, and here the allegiance was a reality; it was to  
 1st Session. the Government, and to society, whereas in Britain it is  
 Debate continued. merely fictitious, being only to one man.

Mr. Gallatin's Every man who took an active part in the American revolution was a citizen, according to the great laws of reason and of nature; and when afterwards positive laws were made, they were retrospective in regard to persons in this predicament, nor did those posterior laws invalidate the rights which they enjoyed under the confederation.

Mr. G. here mentioned his having been an inhabitant of Massachusetts before October, 1780, and he also observed that the law passed in that State was decisive against the common law of England.

In quoting the laws of Massachusetts which were passed in 1785, and afterwards, for naturalizing John Gardiner and James Martin, he remarked that they clearly implied that even a natural born subject, who had not acted in the revolution, and an absentee, was not entitled to citizenship. He likewise took notice of the case of William Smith, of South Carolina, against whose election as a Representative in Congress a petition was presented by Doctor Ramsay, although the decision of South Carolina was exactly the reverse of that of Massachusetts. In speaking of the difficulties that occurred in explaining citizen and alien, he ran over a number of cases, and asked whether, if a person had arrived in the United States during the war, from Nova Scotia or elsewhere, and had taken an active part against the enemy, he would not be better entitled to the right of a citizen, than even those who afterwards subscribed the acts. The counsel for the prosecutors had admitted that a person who had been one of the mass of the people at the declaration of independence, was a citizen. On the same principle, until a law passes to disprove that a man who was active in the revolution, previous to the treaty of peace, was a citizen, he must be one, *ipso facto*.

Mr. G. next read a quotation from the 1st volume of Wooddison, page 382, an English writer, who acknowledges that all persons were aliens at the recognition of independence; and that is a more liberal construction than the counsel for the petitioners would admit of, for by his construction the sailors, &c. ought to be naturalized, lest they be alarmed by the British.

The new constitution of the United States requires certain qualifications for members of Congress, &c., but it does not deprive persons of their rights who were citizens mutually before this constitution was ratified, that made the States the United States. They were united by consent before, and, consequently, I was one of the people, said he, before the United States existed.

He went on to read from the constitution of Massachusetts,

and several other States, sundry clauses in support of his reasoning, and he recapitulated several heads of Mr. LEWIS's arguments, to each of which he replied. [We cannot, however, pretend to follow him through all his ingenious and acute observations, neither do we profess to enter into a recital of the points of law quoted by the counsel for the prosecution, our intention being merely to gratify our readers with a very brief sketch of this business; to attempt more, would be far beyond our limits.]—*Note by the Ed. Phila. Gazette.*

1793.  
3d CONGRESS,  
1st Session.

Debate continued.

Mr. GALLATIN said that Mr. LEWIS was unfortunate in producing the law of Pennsylvania, for, by proving too much, he had proved nothing, for the 42d section of the constitution is retrospective, and, by acknowledging the articles of confederation to be the supreme law of the land, persons who were reciprocally citizens before, are still left in full possession of the right.

Mr. Gallatin's  
defence and  
speech.

So far from any dangerous consequences arising on my construction of citizenship, said he, I think it must be evident that there is more danger and absurdity in the counsel's own construction. For, in remarking on the policy of nations, we find that even slaves have been enfranchised by the great republics in times of common danger. The policy of America should be to make citizenship as easy as possible, for the purpose of encouraging population. Even during the British dominion, that was a principle laid down; and when afterwards it was attempted to be varied, it was made one of the subjects of complaint in the declaration of independence, where it is expressly said that the King endeavored to prevent the population of these States by having laws made to obstruct the naturalization of foreigners.

If there were any dangerous consequences to be apprehended from the former regulations on this subject, they are all remedied by the new constitution. Therefore, no ill consequences or absurdity can follow. The author of the *Federalist* supports this principle in volume 2, page 54, for he says that it is a construction scarcely avoidable, that citizens of each of the States are so in all of them.

The first words of the constitution, "We the people," furnished another argument in support of Mr. Gallatin's principles, which he turned to great advantage, still drawing an inference to show that Mr. LEWIS's construction of the subject was most liable to difficulties and to mischievous consequences.

He concluded by observing, that if there were any disfranchising clauses in the constitution of the United States, tending to deprive citizens of antecedent rights, all such clauses must be construed favorably, and were evidently on his side. With regard to a sentence that had been added by the advice of counsel to the affidavit of Pelatiah Webster, he made some remarks which tended to establish his own per-



1793.  
3d CONGRESS,  
1st SESSION.

Debate conti-  
nued.

sonal character, which he trusted would be found, when traced back to his nativity, to stand the test; and that his right to a seat in the Senate would also stand upon an equally just foundation.

Mr. LEWIS denied ever having seen the affidavit of Mr. Webster, until it was shown him at the time the examination before the committee was going forward.

Mr. GALLATIN recriminated that the clause of which he took notice was not in the affidavit when Mr. Webster brought it to the committee, and that he had permitted it to be added with great reluctance. It was only the recital of a few words that passed between Mr. Gallatin and Mr. Webster, in jest, some years since, wherein Mr. Gallatin had ironically said his name was Sidney, probably alluding to some essays that had appeared in the newspapers under that signature, which have generally been attributed to the pen of another gentleman of this State.

Mr. JACKSON, in order to bring the merits of the business directly before the Senate, said that he would move a resolution that would have that effect; but upon Mr. LEWIS's observing that he had not yet closed his arguments, and at the instance of Mr. BUTLER, of South Carolina, who said he would second Mr. JACKSON's motion hereafter, it was withdrawn for the present, and the debate was postponed till to-morrow.

FEBRUARY 22.

The greater part of this day's proceedings was Mr. LEWIS's pleadings, wherein he entered into a very extensive field of reasoning, and quoted a great number of authorities in support of the principles on which he had set out last Thursday, and to prove that, in the true sense of the constitution of the United States, as well as of that of Pennsylvania, Mr. Gallatin was not duly qualified for the office of a Senator, and, therefore, he trusted that the honorable Senate, upon mature deliberation, would vacate his seat.

Mr. GALLATIN closed his defence in a short speech, wherein he quoted Vattel, page 167, and explained the 42d section of the constitution of Pennsylvania, the liberal construction of which, he said, was in his favor, and the construction contended for by the counsel absurd. He finished by reading a passage from Lord Bacon's works, to show that where there is any doubt in the laws, they should operate in favor of the defendant, and he accordingly made no doubt that the Senate would confirm his election.

A motion was made by Mr. JACKSON, as follows:

*Resolved*, That Albert Gallatin, returned to this House as a member for the State of Pennsylvania, is duly qualified for, and elected to a seat in the Senate of the United States."

*Ordered*, That the consideration of this motion be postponed until Monday next, and that a number of copies of

1793.  
3d CONGRESS,  
1st Session.

**FEBRUARY 28.**

**“Resolved, That an attested copy of the resolution of the Senate, declaring the election of Albert Gallatin to be void, be transmitted by the President of the Senate to the Executive of the commonwealth of Pennsylvania.”**

FOURTH CONGRESS—FIRST SESSION.

CASE II.

WILLIAM COCKE AND WILLIAM BLOUNT, of Tennessee.

MAY 23, 1796.

A letter signed by these gentlemen was read, stating that they had been duly elected Senators to represent the State of Tennessee in the Senate.

On motion, "That Mr. Blount and Mr. Cocke, who claim to be Senators of the United States, be received as spectators, and that chairs be provided for that purpose, until the final decision of the Senate shall be given on the bill proposing to admit the Southwestern Territory into the Union,"

It was moved to refer the consideration thereof to a committee, but disagreed to. The foregoing motion was then carried: Yeas 12, Nays 11.

*Ordered*, That the Secretary present Mr. Blount and Mr. Cocke with an attested copy of this resolution.

JUNE 1.

On motion of Mr. MARTIN, that it be

"*Resolved*, That the honorable William Blount and William Cocke, Esqrs., who have produced credentials of being duly elected Senators for the State of Tennessee, be admitted to take the oath necessary for their qualification, and their seats accordingly"—

*Ordered*, That a paper purporting to be the credentials of Mr. Blount and Mr. Cocke, be read; and,

On the question to agree to the resolution;

It passed in the negative,	{	Yeas, . . . . .	10,
		Nays, . . . . .	11.

So these gentlemen were not admitted to their seats as Senators from Tennessee. It is probable that this decision went upon the ground that their appointment took place *before* the admission of that State into the Union. It was admitted by an act passed this same session.

**THIRTEENTH CONGRESS—THIRD SESSION.**

**CASE III.**

**JESSE BLEDSOE, of Kentucky.**

[Mr. B. addressed a letter to the Executive of the State, resigning his seat, but, not receiving official notice that his resignation had been accepted, was in doubt whether he was still to be considered a member or not. It was resolved by the Senate that his seat was vacated.]

**JANUARY 20, 1815.**

The President laid before the Senate a letter from the honorable Mr. Bledsoe, as follows :

**WASHINGTON, January 20, 1815.**

SIR : Doubts having arisen whether I have still a right to fill my seat in the Senate of the United States, with a view to have the question settled, and a precedent established, and to save my own feelings on a point of duty, I beg leave, through you, to submit the following case for the decision of that honorable body.

Previous to the 24th December last, I forwarded, by mail, my resignation to the Governor of the State of Kentucky, to take place on that day, to be by him communicated to the Legislature of that State, then, and, so far as I am informed, still in session. I was, by a letter from the Governor of that State, advised that he had received my resignation, and would hold it up in the hope of hearing from me, and of a change in my determination on that subject, until about the last of that month, when he would communicate it to the Legislature. Newspaper information states that he did so, and that my successor has been appointed ; which latter fact is also stated in a letter to a gentleman of the House of Representatives, as I have been informed. This is all the information I have received. Whether, under these circumstances, I am to be considered as still a member, will be for the honorable Senate to decide. Wishing it to be understood I have no other solicitude as to the result than to be informed of my duty, which is concerned, in continuing in my place, if I have a right to do so,

I am, with high respect,

Your most obedient servant,

**J. BLEDSOE.**

To the **PRESIDENT of the Senate.**

And the letter was read.

1815.  
13th CONGRESS,  
3d Session.

Whereupon,

Mr. ROBERTS submitted the following motion :

*Resolved*, That the facts stated in the letter of the honorable Jesse Bledsoe, addressed to the President of the Senate, do not vacate his seat in the Senate.

A motion was made by Mr. KING to amend the resolution by striking out therefrom the word "not," and

It was determined in the affirmative by a vote of 25 to 8.

On the question, Shall the resolution pass as amended?

It was determined in the affirmative, { Yeas, . . . 27,  
Nays, . . . 6.

So it was

Seat declared  
vacated.

*Resolved*, That the facts stated in the letter of the honorable Jesse Bledsoe, addressed to the President of the Senate, do vacate his seat in the Senate."

## EIGHTEENTH CONGRESS—SECOND SESSION.

### CASE IV.

JAMES LANMAN, *of Connecticut.*

[It is not competent for the Executive of a State, in the recess of a Legislature, to appoint a Senator to fill a vacancy which *shall happen*, but has not happened, at the time of the appointment.

*Note.*—Such *appears* to have been the ground of decision in this case, but neither the report nor the action of the Senate on it discloses fully the reasons of the decision.]

On the 4th of March, 1825, at a session of the Senate specially called, the credentials of James Lanman, of his appointment by the Governor of the State of Connecticut as a Senator, "to take effect immediately after the 3d of March, 1825, and to continue until the next meeting of the Legislature" of said State, were presented, and read.

A motion was made by Mr. HOLMES, of Maine, "that Mr. Lanman be permitted to take the oath required by the constitution," on which a debate arose.

Mr. R. M. JOHNSON, of Kentucky, made a short speech in favor of the validity of Mr. L.'s credentials, and of his right to represent the State of Connecticut under them.

Mr. TAZEWELL took the opposite side of the question, and entered into an argument to show that the temporary appointment of Mr. L. by the Governor of Connecticut, was, under the circumstances, unconstitutional, and that he was not entitled to a seat under that appointment.

Mr. Lanman, desiring to reply to the arguments advanced against his right to a seat, and wishing a convenient time for reflection and preparation on a subject so important to his State, moved to postpone the question to Monday.

A debate ensued upon the proper mode of proceeding, and on the rights of Mr. L. previous to a decision, &c., by which it appeared to be the sense of the Senate that Mr. L.'s seat was vacant until the pending question should be decided in his favor,

On motion of Mr. EATON,

"*Ordered*, That the foregoing motion, together with the credentials of Mr. Lanman, be referred to a select committee, to consist of three members, to consider and report thereon."

Mr. EATON, Mr. EDWARDS, and Mr. TAZEWELL were appointed the committee.

Mr. VAN BUREN submitted the following motion for consideration:



1825.  
18th CONGRESS,  
2d Session.

*Resolved*, That the Hon. James Lanman have leave to be heard at the bar of the Senate, on the question as to his right to a seat therein, under an appointment made by the Executive of Connecticut."

MARCH 7.

Mr. EATON, from the select committee to which was referred the motion "that Mr. Lanman be admitted to take the oath required by the constitution," together with his credentials, submitted the following report:

Report of the  
committee.

"That Mr. Lanman's term of service in the Senate expired on the 3d of March; on the 4th, he presented to the Senate a certificate, regularly and properly authenticated, from Oliver Wolcott, Governor of the State of Connecticut, setting forth that the President of the United States had desired the Senate to convene on the fourth day of March, and had caused official notice of that fact to be communicated to him.

"The certificate of appointment is dated the 8th of February, 1825, subsequent to the time of notification to him by the President. The certificate further recites, that, at the time of its execution, the Legislature of the State was not in session, and would not be until the month of May.

"The committee have looked into the journals of the Senate to discover if they could find any authority or decision by them on this question, and the following have been found recorded:

[The committee here enumerate and refer to the cases of William Coeke, Uriah Tracy, Joseph Anderson, and John Williams, as given in the annexed list, marked A.]

"In none of these cases does it appear that there was any objection made, or question raised, except in 1801, in the case of Mr. Traoy, when the vote was *thirteen* for, and *ten* against, the right of the member to take his seat. Those are the only analogous cases the committee have been able to find.

"By reference to the statute laws of Connecticut, the committee find that there is a law upon this subject, which is in the following words: 'Whenever any vacancy shall happen in the representation of this State in the Senate of the United States, by the expiration of the term of service of a Senator, or by resignation or otherwise, the General Assembly, if then in session, shall, by a concurrent vote of the Senate and House of Representatives, proceed to fill said vacancy by a new election; and in case such vacancy shall happen in the recess of the General Assembly, the Governor shall appoint some person to fill the same until the next meeting of the General Assembly.'"

The report was read.

The resolution submitted by Mr. VAN BUREN on the 5th,

for permitting Mr. Lanman to be heard at the bar of the Senate, on the question of his right to a seat, having been agreed to,

1825.  
18th CONGRESS,  
2d Session.

Mr. EDWARDS submitted the following motion :

“*Resolved*, That the Hon. James Lanman, appointed a Senator by the Governor of the State of Connecticut, be now admitted to the oath required by the constitution.”

Motion to admit Mr. L. to a seat.

Mr. Lanman then rose, and, in a speech of about an hour, vindicated his right to a seat under the credentials which he had produced, and in reply to those who had opposed his right to a seat.

Mr. HOLMES, of Maine, made a few remarks explanatory of the precedents which had been cited, and to show why he thought himself precluded by the constitution from consenting that Mr. L. should take his seat under the credentials he produced.

Mr. MILLS adduced several precedents to show that members had, on former occasions, been admitted to seats in the Senate under authority similar to that now possessed by Mr. L., and in similar cases; and though he was not perfectly free from doubt on the question, he thought those precedents so weighty, that he was in favor of admitting Mr. L. to take his seat.

The question was then taken on agreeing to the resolution, and determined in the negative : Yeas 18, Nays 23.

Those who voted in the affirmative, are,

Messrs. Bell, Boulogny, Chase, Clayton, D'Wolf, Edwards, Harrison, Hendricks, Johnston, of Louisiana, Kane, Knight, Lloyd, of Massachusetts, McIlvaine, Mills, Noble, Rowan, Seymour, and Thomas.

Those who voted in the negative, are,

Messrs. Barton, Benton, Berrien, Branch, Chandler, Dickerson, Eaton, Findlay, Gaillard, Hayne, Holmes, of Maine, Holmes, of Mississippi, Jackson, King, of Alabama, Lloyd, of Maryland, Macon, Marks, Ruggles, Smith, Tazewell, Van Buren, Van Dyke, and Williams.

So it was resolved that Mr. Lanman was not entitled to his seat in the Senate.

Mr. L. not entitled to the seat.

The following list of executive appointments was made out from the journals, and placed in the hands of the committee by whom the foregoing report was made.

#### A.

#### *Appointments to the Senate, by the Governors of States, during the recess of the Legislatures thereof.*

Appointments of this character will be found inserted in numerical order, and where any question has arisen upon the right of Senators so appointed to their seats, the decision of such question will be given.

1. April 26, 1790, John Walker, of Virginia, appointed by the Governor, in the place of John Mason, who had re-

## Appointment of Senators by the Executives of States.

3. George Watson, of Georgia, appointed by the Governor in the recess of the Legislature of the State, appeared on the

18th of December, 1795, produced his credentials, and took his seat.\*

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4. William Cooke, of Tennessee, produced his credentials of appointment by the Governor, and on the 15th of May, 1797, took his seat.

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by the Execu-  
tives of States.

5. William North, of New York, appeared on the 21st of May, 1798, and took his seat.

6. Daniel Smith, of Tennessee, appointed by the Governor in the place of Andrew Jackson, resigned, appeared on the 3d of December, 1798, and took his seat.

7. Franklin Davenport, of New Jersey, appointed in the place of John Rutherford, appeared on the 19th of December, 1798, and was admitted to his seat.

8. On the 4th of March, 1801, Uriah Tracy, of Connecticut, having presented under an appointment by the Governor and Council of the said State, exception was taken to the credentials, and a debate ensued thereon; but on motion that he be permitted to take the oath required by the constitution,

It passed in the affirmative, { Yeas, . . . . . 13,  
  { Nays, . . . . . 10.

And the oath was accordingly administered to Mr. Tracy, by the Vice President.

9. Samuel White, of Delaware, appointed in the place of Henry Latimer, resigned, was admitted to his seat on the 4th of March, 1801.

10. William Hindman, of Maryland, appointed by the Governor, appeared on the 5th of March, 1801, and took his seat.

11. George Logan, of Pennsylvania, appointed in the place of Peter Muhlenberg, resigned, appeared on the 7th of December, 1801, and took his seat.

12. Thomas Sumpter, of South Carolina, was also appointed by the Governor of that State on the 3d of December, 1801, but it does not appear by the journals that he

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\* It may be proper here to notice a proceeding which occurred in the Senate during the first session of the fourth Congress, inasmuch as its probable object was to deprive a Senator of his seat.

On the 26th of February, 1796, a letter was laid before the Senate, from the Governor of Kentucky, with divers papers accompanying the same, which were ordered to be referred to a committee to consider and report thereon. A committee was accordingly appointed, and by their report, it appears that the said letter contained a memorial of the "Representatives of the State of Kentucky," setting forth that H. M., a Senator from that State, had been charged by two judges of the court of appeals of Kentucky with having committed a gross fraud, and with being guilty of perjury in his answer to a certain bill in chancery. The memorialists requested of the Senate an investigation of these charges, and the accused joined in the same request, and was willing to waive all right of exception to the proposed mode of proceeding. But it was the opinion of the committee that the Senate had not jurisdiction of the case, and that no consent of parties could operate to give jurisdiction, and that the memorial ought to be dismissed.

In these opinions the Senate, after some days' debate on the subject, concurred. See Senate Journal, vol. 2, pages 223, 225, and 227.

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took his seat under that appointment, for he appears, on the 19th of December, to have produced credentials of an election by the Legislature, and to have taken his seat in virtue of such credentials.

13. On the 17th of October, 1803, John Condit, of New Jersey, and John Taylor, of Virginia, appointed by the Executives of those States, respectively were qualified, and took their seats.

14. John Armstrong, of New York, appointed in the place of De Witt Clinton, resigned, on the 7th of December, 1803, took his seat.

15. William B. Giles, of Virginia, appointed in the place of Abraham B. Venable, resigned, and Andrew Moore, of the same State, appointed in the place of Wilson C. Nicholas, resigned, appeared on the 6th of November, 1804, and took their seats.

16. George Jones, of Georgia, appointed in the place of Abraham Baldwin, deceased, took his seat on the 26th of October, 1807.

17. Joseph Anderson, of Tennessee, his term having expired, was reappointed by the Governor, and took his seat on the 4th of March, 1809.

18. Samuel Smith, of Maryland, appointed in the same manner, took his seat on the same day.

19. John Condit, of New Jersey, appointed in the place of Aaron Kitchell, resigned, appeared on the 24th of May, 1809, and took his seat.

20. Stanley Griswold, of Ohio, appointed by the Executive of the State, appeared, and on the 9th of June, 1809, it was ordered that his credentials be referred to the Committee of Elections. On the 15th of June, the committee reported favorably thereupon, and he was admitted to his seat.

21. Charles Cutts, of New Hampshire, appointed by the Executive, took his seat the 24th of May, 1813; and on the same day, William H. Bullock, of Georgia, appointed in the place of William H. Crawford, was admitted to his seat.

22. Christopher Gore, of Massachusetts, appointed in the place of James Lloyd, resigned, appeared on the 28th of May, 1813, and the constitutional oath was administered to him.

23. George Walker, of Kentucky, appointed in the place of George W. Bibb, resigned, appeared on the 10th of October, 1814, and took his seat.

## TWENTY-THIRD CONGRESS—FIRST SESSION.

### CASE V.

**ELISHA R. POTTER vs. ASHER ROBBINS, of Rhode Island.**

[On the 19th of January, 1833, Mr. Robbins was elected a Senator of the State of Rhode Island, for the term of six years from the 4th of March succeeding; his credentials in due form were made out and furnished to him, and were, in February, 1833, read in the Senate, and recorded on its journals. In October, 1833, the General Assembly of Rhode Island declared this election void, on the ground that the Legislature by which it was made had not, at the time, a due and legal existence, and, proceeding to the election of another person, they made choice of Mr. Potter. It was *held*, after debate, that Mr. Robbins was entitled to be sworn in, and take his seat, in the first instance, leaving the validity of his election to be determined on the report of a committee; and he was ultimately confirmed in his seat by the Senate.]

DECEMBER 2, 1833.

On the opening of the session, the Vice President being absent, the Hon. HUGH L. WHITE, of *Tennessee*, President *pro tem.* at 12 o'clock, called the Senate to order.

After several new members had appeared, exhibited their credentials, and been sworn in,

The CHAIR presented the credentials of E. R. Potter, elected a Senator from Rhode Island, for which State Asher Robbins had been previously elected; and also a certificate that the election of the said Asher Robbins was null and void; which documents were read.

Debate on the question of admitting Mr. R. to be sworn.

The CHAIR stated the facts of Mr. Robbins having been returned as elected, and his credentials read at the last session, and left it to the Senate to determine on the course to be pursued as to the qualifying of either of these gentlemen.

On motion of Mr. POINDEXTER, the credentials of Mr. Robbins were then read.

Mr. POINDEXTER then rose, and said that it was not his intention to offer any opinion on the merits of the course which had been adopted by the State of Rhode Island, but merely to say that it seemed to him to be a matter of course that the Senator just elected, and whose credentials were presented at the last session of the Senate, should be permitted to approach the chair and take the oath; and that the other gentleman, who contests the election of Mr. Robbins, should present his credentials either to the Committee of Elections, or the Committee on the Judiciary, and that the Senate should afterwards receive the report of that committee, and determine which of the gentlemen is duly elected.



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But he was not prepared at this time to question the election of the gentleman whose credentials were before the Senate at the last session, until a committee of the Senate should have decided that he was not fairly elected. He was not prepared at present to offer an opinion on these points, but he thought that the Senator in his seat should approach and take the oath.

He then moved that Mr. Robbins do take the customary oath.

Mr. CLAY suggested the propriety of making the collateral motion that the credentials of Mr. Potter be laid on the table.

On motion of Mr. POINDEXTER, it was then ordered that the credentials of Mr. Potter do lie on the table.

Mr. KING thought it would be the most proper course to leave both the gentlemen where they are, until it should be determined which was entitled to the seat. He adverted to the practice of the House, in referring cases of contested elections to the Committee of Elections, whose report had sometimes the effect of ousting the sitting member. As this was a novel case, he thought it would be better that neither of the individuals should be qualified until it should be determined which was entitled to the seat. It might happen that an important question would be determined by a single vote; and in that case, if it should be afterwards discovered that a member was illegally admitted to a seat, the decision might be vitiated. He suggested that, for the present, the credentials of Mr. Robbins should also lie on the table, and that neither should be qualified.

Mr. CLAY admitted the delicacy of the question now presented to the Senate, but expressed a hope that it would be examined with a becoming firmness, and resolution to act justly. At present, Rhode Island stood in the Senate with three representatives, and he was willing to admit that, if he had the power, there was no State in the Union to which he would be more ready to allow a triple representation. But the constitution prescribed a restriction, and she could only have her two Senators. The Senator from Alabama had complained that it would be doing injustice to the State to admit her three Senators, and therefore he desired to limit her to one Senator. That would be a course in opposition to the rights of that State, and of every other State in the Union, because the State of Rhode Island had a right to her two voices on that floor on every question, and the Senator could not say that she should have but one.

It was not only the right of Rhode Island, but of every State, to have two voices on every question which could arise, and the first act of the Senate, by which the States could be secured in this right, was the verification of those who composed that body. It was the right and the imperative duty of the Senate to say who were to be the Senators,

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and who were the individuals to be associated in the performance of the important duties which devolved upon them. It was now the time to decide, not conclusively, he admitted, which are the two members from the State of Rhode Island to be admitted to their seats. The question would then come up as to the ultimate right of either of the contesting members. On this question he was, perhaps, as well prepared to give his opinion now as at any time, having, by examination, made himself acquainted with the whole subject. But the proper course, at this time, was to determine who should have the temporary occupation of the seat which was contested. By the laws of Rhode Island, a time had been appointed for the election of United States Senators; by the laws, that time had been fixed previous to the expiration of the time of the existing Senators; by the laws, the election of Senator had taken place prior to the 4th of March last; and, in conformity to these laws, Mr. Robbins had been elected, his credentials were certified, presented to the Senate, recognised, and recorded. So far, therefore, every thing was conducted in conformity with the constitution and the laws of Rhode Island. In the month of October last, another session of the General Assembly of the State was held, and, without waiting to see if the United States Senate would pronounce the election of Mr. Robbins valid, they pronounced it to be invalid; thus, by their own act, and without any consultation with the United States Senate, declaring the first election null and void, and electing another Senator, who had now presented his credentials. The gentleman first elected, and who had the *prima facie* right to his seat, had, in conformity to law, presented his credentials; his was the prior, and therefore the valid deed; and, in compliance with every law and usage, he ought to be admitted. But he desired it to be understood that, in taking this course, he wished to do nothing which would preclude to the other gentleman the privilege of a full investigation of his right. He had used the term *prima facie*, and he requested the Senate to look at the credentials presented by Mr. Potter, which admitted on their face the previous election, the validity of which it disputed, on the ground of some non-conformity to forms. He had, however, risen only, without meaning to express any opinion as to the ultimate right of either of the members, to vote for the admission to his seat of the gentleman who was first elected, and for leaving the validity of the right to be afterwards examined by a committee of the Senate.

Mr. KING congratulated the Senator from Kentucky on the knowledge which he had acquired of this case. For his part, he had not made himself so well acquainted with the facts, and he was not so well prepared to argue the question, and to decide who was entitled to the seat under the constitution, laws, and usages of Rhode Island. He wished to act

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in such manner as would be perfectly fair and respectable to the State, and to the gentlemen claiming the seat. It was his wish that the State should be represented by the Senator she had duly elected—he would not say which that was: it might be this gentleman, or it might be the other. He thought it would be well, as it was a novel case, to refer it to a select committee; and whenever the report of that committee should be submitted, he would be prepared to say which of the gentlemen was, in his opinion, entitled to their seat.

If the State was to be deprived of a Senator, it was the fault of the State herself. He was prepared to give her all she was entitled to, but no more. She was entitled to her representatives on this floor who were constitutionally elected. But who were they? There was no dispute as to one of the Senators of the State. As to the other, whose credentials were presented at the last session, his claims were contested. His credentials were, it was true, presented last session in the common form, and were received without any examination, as was usual. In this way it was impossible to know the authenticity of any credentials. They were received by the Senate as a matter of course, and no one could be prepared to say whether documents presented in this manner were genuine or forged. He referred to the practice of the House of Representatives in cases of contested elections, and stated that there an individual, whose right was contested, did not take his seat until he had established it. With the gentleman just elected he had the pleasure of an intimate acquaintance; and if his right to the seat should be declared valid, he should be glad to continue that intercourse. He was not prepared, however, at this moment, to go into an argument on the question, whether, under the constitution, laws, and usages of Rhode Island, that gentleman was duly elected or not. If the gentleman from Kentucky was prepared to go into the question, he would confess that he was not ready to say who is the proper person to be qualified. He hoped there would be no precipitancy, but that the subject would be referred to a select committee for examination.

Mr. CHAMBERS observed that the Senate was perhaps placed in rather a delicate situation, and should, therefore, do no act to the prejudice of those who, like himself, had not given the subject a sufficient examination to enable them to come to a correct conclusion. The remark was certainly true that the State of Rhode Island was entitled to be at once properly represented on that floor; and a case had been put by the Senator from Alabama, by which she might not be represented, from having no more than one voice; but this, Mr. C. said, could not be in consequence of any act of the Senate. Other cases might arise which would leave to a State but one Senator to represent her; a death or a resig-

nation would create a vacancy which could only be filled by the constitutional mode of election; but in such cases the Senate of the United States could not in the slightest degree be culpable. Was the Senator from Alabama prepared to say that the State of Rhode Island should not be properly represented on that floor, because the question of right to one of her seats was still undecided? For his part, Mr. C. said, he was not prepared to come to any such decision. If there were no parallel case precisely similar to the present, there were certainly some plain landmarks by which their course might be guided. There were analogous cases to be found in the histories of all legislative bodies; and it had been uniformly settled in all contested elections, that the party having the priority of claim held his seat until his right was contested, and a decision had passed against him. But the gentleman from Alabama contends, said Mr. C., that in that event the proceedings of that body might be vitiated. If this doctrine could be maintained, Mr. C. would admit that the argument was entitled to some weight.

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But could, asked Mr. C., any measure be carried through the Senate, that could possibly be jeopardized by allowing the Senator first elected to retain his seat? We have no rights that we have not in common with the House. Have there not been cases of contested elections; and has any law ever been rendered inoperative because the member first returned, and whose seat had been subsequently vacated, had voted for or against it? Would the President, in the plenitude of his power, veto a law so passed? It was incident to all legislative bodies similarly constituted with ours, to have such questions before them, and the course of proceeding in them was the only plain and obvious one that had hitherto always been pursued. Without meaning, in the slightest degree, to prejudice the rights of the gentleman who claimed the seat to which Mr. Robbins had first been elected, Mr. C. held it to be perfectly right and proper to give to Mr. Robbins the contested seat, until a proper investigation should decide to whom it belonged. He had risen, he said, merely to call the attention of the Senate to analogous cases, without intending to express any opinion as to which of the gentlemen had ultimately the strongest claim to the seat. No difficulty could possibly arise by giving the seat to the gentleman first elected, until the decision should be made; and in any event he was satisfied that the State of Rhode Island would be ably and faithfully represented.

Mr. KING, of Alabama, said a parallel case had been already before the Senate. In 1825, Mr. Lanman brought his credentials from the Governor of Connecticut, as a Senator from that State. They were read, and on a motion of Mr. HOLMES, of Maine, that he should be qualified and take his seat in the Senate, a debate ensued. On motion of Mr. VAN BUREN, Mr. Lanman had leave to be heard at the bar of the Senate,

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in relation to his right to a seat. The question was referred to a committee, and Mr. ELATON made an unfavorable report. The Legislature of Connecticut had adjourned when the appointment was made, and the Governor having no authority *prima facie* to make the appointment, the Senate refused to receive him as a member.

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Mr. KANE said that he wanted time for the further consideration of the subject. He did not admit that the question before them was an unimportant one. What was that question? Two individuals had presented certificates, alike valid, claiming seats in that body; and it was for the Senate to decide which party was entitled to admission. No contest of this character had ever arisen in that body. It was not a case where one member had brought a regular certificate of election, entitling him to hold his seat as a matter of course, till that certificate should be set aside: but it was a case in which two individuals had brought certificates, both claiming to be valid; and it was for the Senate to decide upon the characters of these certificates. The case was a new one, and it was of the utmost importance to the interests of Rhode Island, and of the Union, that it should be fairly and deliberately met by the Senate.

The main argument of some of the gentlemen who had preceded him, had been the right of Rhode Island to be represented in that body. No one questioned this right; but it seemed to him that such right would not be of much value to Rhode Island, if the Senate were to decide, in this summary way, who should be her representative. The certificates of the two members, given under the authority of the State, were both fairly before the Senate. Should the Senate at once proceed to say that the second was of no importance? Should they be so kind to Rhode Island as to take the appointment of her Senator out of her hands, and to say, that when she declared the first election null and void, she had made a false declaration? This was a point involving the sovereignty of the States; and the Senate had been termed *the ambassadors of the States*. It became them, then, to consider this point with all the attention and deliberation which its importance demanded. He would not detain the Senate with an argument at that time. The subject was new to him, and, under the circumstances, he asked time. He, therefore, moved to postpone the further consideration of the subject.

The motion for postponement was lost: Yeas 16, Nays 17.

Mr. CLAY said he would add but a few words to what he had already said on the subject. He did not suppose that the opinion he had expressed with regard to the duty of the Senate, would subject him to the imputation of improper motives. The subject was one which all knew would come before the Senate. Senators had a right to form their opinions; and he had consequently looked into the subject, and formed one for himself. But he had expressed no opinion with re-



gard to the question between the two individuals claiming seats in that body. He had only expressed his opinion with regard to what he conceived ought to be the course of the Senate at the present time. Nothing was clearer than that the State of Rhode Island, by the constitution, was entitled to two representatives in that body. It was equally clear, that, when she had appointed her Senators, her right, for the time being, ceased; her jurisdiction over the Senate passed from her, and she was without power till the constitutional period for her again to exercise her right of appointment should recur. To illustrate this position, he would ask, who was the representative of Rhode Island from the 4th of March, the date of Mr. Robbins's appointment, till October, the date of Mr. Potter's claim? Supposing the Senate had convened on the 5th of March, as would have been the case had the present Executive lost his election, who then would the Senate have been bound to receive as the Senator from Rhode Island? There could have been no doubt. Again: Supposing, at any time between the 4th of March and October, the Senate had been convened on some extraordinary occasion, would there have been any doubt in this case? He would make still another supposition. Supposing Rhode Island had not elected a third Senator. There would then have been no doubt with regard to the validity of the credentials presented by Mr. Robbins. Where, then, was the difficulty with regard to the present duty of the Senate? They were most plainly bound to act with reference to the candidate holding the regular certificate, as they would have acted had circumstances permitted him to have presented his certificate earlier.

He admitted that the present was an important case. There had been cases in which Senators had been requested to resign; there had been cases of instruction, and there had been cases where Legislatures had declared that Senators did not express the will of their constituents; but this was the first case where a Legislature, having exhausted its constitutional power to choose a Senator, had attempted, at the expiration of a half or a third of a year, to choose another. It was indeed an important question; one involving the constitutional rights of the Senate. The Senators were elected to remain there during their constitutional terms, and that body was then removed in part from the influence of temporary changes in the popular opinion. But if it were permitted to the Legislature of Rhode Island to disregard the election of Mr. Robbins, then, should there be a reaction in that Legislature, a *fourth* Senator might be sent. It was indeed an important question, how far the Senate should lend itself to support changes of this character. But this was not the question before the Senate. The true question was, should the Senate proceed to receive the Senator elect from Rhode Island? Two Senators presented their credentials, both do-

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cuments duly authenticated, but one possessing priority of date. Was the circumstance of priority of no importance? He considered it a matter decisive. The State had elected —she had fairly chosen her Senator. Afterwards, it appears, some mistake was imputed, and a new election had. Let the Senate take the Senator they would have been bound to have received on the 5th of March, and then inquire into the error, if one it were, subsequently detected. Such was his view, and he had obtained it without resorting to any other medium of investigation than that of common sense.

Mr. FRELINGHUYSEN observed that he did not feel the embarrassment which had been expressed by the member from Illinois, and he would assign the reason. The gentleman was embarrassed by the fact that two Senators had been presented with conflicting appointments; but it was the business of the Senate to decide on the legality of any and every appointment to a seat among them, and the views of the gentleman were, therefore, not authorized by the constitution. [Here Mr. KANE explained, that he was embarrassed for the want of a knowledge of the constitution of Rhode Island.] Mr. FRELINGHUYSEN said the Legislature of Rhode Island was not called upon to decide the merits of an appointment. Mr. Robbins had appeared at the last session, his credentials were read, and filed on the records of the Senate, and the Senate had settled the question of his election; but, in the intermediate time, the Legislature of Rhode Island had assumed the province of the United States Senate, and had declared the seat vacant. It was the business of each House of Congress to decide on the qualifications of its members; and the Senate having settled the point in the present instance, there could be no vacancy till that decision should be reversed by the same body. The State Legislature had exceeded their functions; it was not in the power of a Legislature to vacate a seat in the United States Senate; the constitution had taken it out of their reach, and had reserved it to the Senate. The Senate should regard it as a question of qualifications, and, till that should be decided, there could be no doubt that the first elected was entitled to the seat. If it were not so, the constitution was a dead letter. The vacancy could occur only by the action of the Senate; the State Legislature could not stop between them and the question; the matter was placed beyond the reach of State political collisions.

Mr. F. had one word to say in regard to Mr. Lanman. His rejection was made on the Senate's own motion; there was no petition, no representation, no remonstrance, presented on the subject. The appointment was so clearly void, that the Senate saw at once, and acted accordingly. But the admission of Mr. Robbins corresponded with the authority of the State, and his seat could be vacated only by the Senate's authority.

Mr. WRIGHT, of New York, regretted extremely to see such a question as the present before the House. He was almost wholly ignorant of the nature of the case, and of the peculiar laws by which Rhode Island was governed. He wished to know whether he was to be called upon to pronounce upon a preliminary or upon a definitive measure—upon the propriety of electing, or upon the election of either of the contending candidates. He must confess that the conduct of the Legislature of Rhode Island appeared to him a little extraordinary. They send to the Senate of the United States a Senator whom they declare, by the certificate granted him, to have been duly elected, and, at a subsequent session, they send *another*, declaring their previous election to be null and void. Had the Legislature of Rhode Island the power to do this—to decide *at all* upon this question? Had they not, on the contrary, by the election of Mr. Robbins, referred the matter to a higher tribunal than themselves—that of the Senate of the United States, which was *now* alone able to decide upon the case? He again expressed himself to be ignorant of the entire merits of the question—he had never seen the statute of Rhode Island—and hoped he should not be called upon to give his vote until he had acquired the necessary information. He would conclude by moving that it be referred to a committee of inquiry.

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Mr. EWING said the question was an important one, and the true question was, whether the vacancy was filled *prima facie*, not whether it was filled properly. And if it was filled, what was the evidence? It was nothing short of a certificate from the Governor of the State, forwarded to the Senate, at the proper time and in the usual manner, and now placed among its records. If then this evidence was received in the proper time and manner, what was the objection? Who was to determine on the constitutionality of an act not subject to the decision of the Legislature? A Legislature could repeal and modify its own acts; but one Legislature had no right to pronounce on the constitutionality of the acts of a preceding Legislature, except when the whole power was conferred upon it, which was not the case in any State, nor in the United States. The acts of the Legislature were binding; and courts only, or the Senate of the United States, could declare them void.

The gentleman from New York had said that the latter choice of a Senator was of more force than the former; but if their power to act had expired, it was of no force at all. The mere fact that a legal choice had been made, which gentlemen had not denied, took it from the power of a subsequent Legislature to elect another, and such an election would, of course, be nugatory. The subject was indeed worthy of investigation, and he was ready to investigate.

Mr. BIBB could not have believed that such a case would ever have been brought before that House; could ever,

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to the seat.

from the very constitution of the United States, have arisen. He felt surprised at the astuteness of the human mind, and at the aptitude which it at the same time possessed, of creating difficulties where none existed. The constitution declared that two Senators should be sent from every State; one Senator from Rhode Island already sat in that House, and Mr. Robbins had been appointed by the Legislature of Rhode Island to fill the remaining vacancy. The same Legislature, however, had since sent another candidate; had presented the House with two certificates. He did not here recognise the matter as a contested election; the House had, in the present stage of proceedings, nothing to do with such a subject. Whether Mr. Robbins had been duly elected or not, was not here the question. He (Mr. B.) was perfectly unbiassed; he had not been able to bestow much attention on the subject, and would willingly have postponed the consideration of the subject until to-morrow. He was, however, called upon to perform a duty *instantly*, and even under such circumstances he had no hesitation in saying that none other than Mr. Robbins could be elected. He had formed no previous judgment upon the subject, excepting as regarded the two certificates, and the light in which such a matter was viewed by the constitution. Mr. Robbins's certificate was unexceptionable; but the next certificate told them that the Senate of Rhode Island, in electing that gentleman, had neglected to comply with a certain act, and had in other respects acted prematurely; that Mr. Robbins's election was therefore null and void, and that they had subsequently chosen another gentleman. The Legislature of Rhode Island undertook to decide the matter! Did it belong to the Legislature of Rhode Island to do this? The constitution says not; but the right of decision rested with the members of that House. Mr. Potter's certificate acknowledged that Mr. Robbins was elected, but prematurely. Were members to acknowledge the right of Rhode Island to decide upon this subject or not? If they did not, there was nothing to prevent Mr. Robbins from taking his seat amongst them. He (Mr. B.) never expected that a contested election could have made its way into that House. Had he to make a rule, to begin again *de novo*, he would propose that neither gentleman should be elected until the matter had been decided. Mr. Lanman's case had been cited, but it was totally different from the one before the House. The Governor had thought fit to appoint Mr. Lanman to a vacancy which *would* occur; not one which *had* occurred. His (the Governor's) act was consequently declared void. He (Mr. B.) hoped that those who voted upon the present, should not be considered disqualified to express their opinions upon any subsequent occasion.

Mr. BENTON little expected to hear such a debate as that to which he had just listened. He knew something, it was true, of the matter, from current report; but had not looked

deeply into it, and did not expect to have been called upon to-day to say a single word upon the subject. Yet the whole had been gone into, and members had refused to permit the matter to lie over even for a few days. He had little regard for precedents; no man, in fact, despised them more than himself; he considered that they were the bane of this country as they had been of England, but that if ever there was a precedent, the case of Mr. Landen was one as connected with the subject before the House.

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1st Session.

Debate continued.

Mr. BENTON continued, and contended that, from the circumstances attending this election, they were called upon to suspend their decision until the facts of the case were more fully explained and known. The Legislature had several times refused to go into an election, and yet, at last, with the knowledge that there would be a change of parties, had gone into the election. Putting, then, these decisions against their own power, together with the solemn decision against it, which they had heard, were they not to wait one day, would there not another sun rise upon them, would they not wait until to-morrow to find out what were really the facts of the case? He hoped that he knew his place too well to read, as authority, what was not properly such, to the Senate; but, with that paper which he held in his hand, he would undertake to suppose that the facts were as he had stated. Would they not allow themselves till to-morrow to ascertain if they were so or not? Doubtless, his supposition might be injurious to one or both sides, and he had not had the most remote idea of expressing these opinions; nor should he have done so, had he not been driven into it by the course which things had taken. Mr. B. concluded by moving that a select committee of five be appointed to investigate the matter, and report upon it to the Senate. He would further ask not to be appointed a member of such committee, having expressed the opinions he had done upon the case.

Motion to appoint a select committee and refer the case.

Mr. MANGUM inquired if the motion was in order.

The PRESIDENT *pro tem.* decided that it was.

Mr. POINDEXTER wished to be informed if the motion of the Senator from Missouri (Mr. BENTON) included an investigation into the credentials of Mr. Potter, as well as of those of Mr. Robbins.

Mr. BENTON replied in the affirmative.

Mr. POINDEXTER said he should conceive, then, that the motion was not in order, inasmuch as the credentials of Mr. Potter had already been laid upon the table.

Mr. MANGUM wished briefly to express his opinion on the subject before the Senate. Much had been said as to the disrespect which would be shown to Rhode Island if either Senator were permitted to sit; or if they would not permit the Senator who presented his credentials the last session to sit. Whenever, on an election, the question had presented itself, as to which one of two or more had the right to sit,

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1st Session.

Debate on the  
*prima facie*  
right of Mr. R.  
to the seat.

usage had been, that he who produced *prima facie* evidence of having been elected should be permitted to sit; the matter was then referred to a committee, upon whose report the Senate acted and decided. He thought that in this case one of the parties ought to be permitted to sit. It would be immaterial, then, whether the Senate proceeded at once to act on the *prima facie* evidence itself, or referred the subject, as usual, to a committee; the latter, however, was the customary mode of procedure. The whole question, then, was, is there any *prima facie* evidence? That there was such evidence, was, in his opinion, perfectly clear. What was the action in ordinary cases? A certificate was received from a State declaring a certain party duly elected. Why was that certificate received as evidence of the fact? Because there were certain seals appended thereto, expressly designed to authenticate whatever they were attached to. Those seals were appended to the credentials in this case. The election was stated to have taken place in the usual time and manner of elections for Senators in Rhode Island. On the face of the election it was a good one.

The view taken of the matter by one of the Senators from Kentucky appeared to him unanswerable, that if the Senate had sat after the 5th of March, there could have been no dispute on the subject. What, he would ask, was *prima facie* evidence? It was evidence being what it purports to be. The credentials in this case were of that character. The Legislature of Rhode Island had endeavored to avoid this. But though he thought that Legislature was not the proper tribunal to adjudicate this matter, he could not agree that if the Senate should think that Mr. Robbins had not a right to a seat on that floor, that from thence it must necessarily follow that Mr. Potter's election was not good. If the Senate, on examination, should be of opinion that the first election was void, he could not see why the Legislature of Rhode Island, who had acted on the same opinion, should not be sustained in their election of Mr. Potter. As to the question of *prima facie* evidence, however, there could be no dispute. He believed, from the plain language of the constitution, that Rhode Island had not a right to act definitively on this matter; if she did so, it was at her peril. Their legislation had no weight with them; but if subsequent events should sustain her in the course she had pursued in pronouncing the first election void, he thought it did not follow that the person last elected should not take his seat. Mr. M. said that he regretted that it had been thought necessary then to enter into the subject, with such an imperfect and mangled view of facts before them. He was indifferent whether the matter was referred to the usual committee, or to a select committee. Whatever might be his personal feelings on the subject, they would have no influence on his determination. The whole matter in dispute



was as to the organization of the body; and there was high authority for believing that it was properly organized. He thought that they ought to consider the first certificate as good until they had further evidence.

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23d CONGRESS,  
1st Session.

Debate continued.

Mr. POINDEXTER observed that he had a few words to say in regard to the constitution of the United States. It gave the Senate power to judge with regard to the election of its own members. The State Legislatures were incompetent to decide. When testimony had been given that the Legislature had previously elected a Senator, until there was some action of the Senate on the certificate, there was nothing further subject to the Legislature; their power was spent; and to resuscitate it, required the action of the Senate of the United States. He concurred with the Senator from Kentucky, that any act of the Legislatures, till the United States Senate had decided, was nugatory. Two gentlemen had been presented for a seat in the Senate; one had been chosen, his credentials had been received and put on the journals of the Senate; a change of politics had taken place in the State; a new trial had been made, and a verdict obtained to set aside the preceding election. If such a course of things were permitted, there would be no end to the mischief it would occasion; every fluctuation in the State of parties might produce a new Senator; if we receive one, the Legislature may vacate his seat, and another; and another, without end. The rule was founded on common sense, that when a Legislature had acted, its power was spent, and not resuscitated till the Senate had declared that act null and void. [Here Mr. P. read the constitution on the subject.] He made a supposition that a Senator had been elected under thirty years of age, contrary to the constitution, and asked whether, in that case, it would be competent for the Legislature to vacate the seat. The proper course would be to memorialize the United States Senate, stating that the member elect was in his political minority; and when the Senate had determined the question, let them declare so, and notify the Legislature to make a new appointment. Or, if the Senator elect had not been nine years a citizen of the United States, or was not a citizen of the State, but should present his credentials in due form of law, could the Senate refuse to administer the oath, because a subsequent Legislature had determined that he was not qualified? The member whose credentials had been brought forward and accepted, was the sitting member, even admitting that he were under thirty, or not a citizen of the State, till the Senate had determined these points; they were subjects of investigation, and it was right that they should be investigated, but, till that was done, there was no power to deprive him of his seat; it was not even in the power of the Senate to take his seat from him. He thought it unnecessary to inquire into his legal right to his seat, till a committee should report; and then, if it ap-



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1st Session.

Motion to refer  
to a committee  
lost.

appeared that the member was improperly chosen, he should vote that his seat should be vacated.

Mr. BENTON moved a reference of the whole subject to a special committee of five members, and demanded the yeas and nays on the question, which were ordered. The question was then taken on his motion, and decided as follows:

YEAS—Messrs. Benton, Brown, Grundy, Hill, Kane, King, Morris, Rives, Robinson, Shepley, Tallmadge, Tipton, White, Wilkins, Wright—15.

NAYS—Messrs. Bell, Bibb, Chambers, Clay, Ewing, Frelinghuysen, Hendricks, Kent, Knight, Mangum, Moore, Naudain, Poindexter, Prentiss, Silsbee, Smith, Swift, Tomlinson, Tyler—19.

So the motion was negatived.

The question was then taken on the motion of Mr. POINDEXTER, and decided in the affirmative.

Mr. R. admitted.

Mr. Robbins then took the oath.

DECEMBER 4.

Mr. S. WRIGHT offered the following resolution:

Mr. Wright's  
resolution to  
appoint a com-  
mittee, &c.

*Resolved*, That the proceedings of the Legislature of the State of Rhode Island, now upon the table of the Senate, showing the appointment of Elisha R. Potter as a Senator to represent that State in the Senate of the United States, be referred to a select committee of five Senators, to inquire and report upon the claim of the said Elisha R. Potter to the seat in the Senate now occupied by the Hon. Asher Robbins."

Mr. WRIGHT said he was not sufficiently conversant with the rules of the Senate to determine if the resolution was required to lie for a day on the table, or whether it would now be taken up for consideration.

The CHAIR replied that it was the usual practice of the Senate for resolutions to lie over for a day; but, as this resolution had reference to papers which were lying on the table of the Senate, he considered that it did not come within the rule, and that it would come up now for consideration.

Mr. CLAY then expressed a hope that the resolution should lay on the table until to-morrow. He adverted to the rule of the Senate which required that the appointment of committees should be made by the President of the Senate. That officer was not now in the chair. He had no doubt that good reasons could be shown for his absence. But a time might come when the Senate might be deprived of the proper appointment of their committees, by the intentional absence of the Vice President, and the devolvment of this important duty on his temporary substitute. He did not know that there was any such intention in the present instance; but, if it were permitted to grow into a practice to appoint the committees in the absence of the Vice Presi-

dent, the exception might become the rule, and the rule the exception. Unless the President of the Senate should arrive shortly, the duty of appointing the standing committees would devolve on the gentleman who is the temporary occupant of the chair. This was a consideration of great importance; and although he had as much confidence in that gentleman as in any other who would fill the chair, there might be some cases in which his fitness for the duties imposed on him might not be equal to that of the Vice President himself. But, in the present case, he thought the Senate ought to appoint the committees themselves. This was due to the dignity of the State of Rhode Island herself, as well as to the intrinsic importance of a case involving a contested election. Some reflection on the subject was certainly necessary, and he wished the resolution to lie on the table until to-morrow, until the proper course of proceeding should be determined.

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Debate on the  
appointment of  
a committee,  
&c.

He then moved to lay the resolution on the table, but withdrew the motion at the instance of

Mr. KING, of Alabama, who stated that the Senator from Kentucky had mistaken the operation of the rule. The select committees were not appointed by the presiding officer, but were elected by the Senate, unless otherwise ordered by unanimous consent. In reference to the appointment of the standing committees, if any evil was likely to arise from the absence of the Vice President, the Senator from Kentucky could hereafter take any course he pleased. In this instance, however, the committee would be created by election of the Senate, and therefore the objection of the gentleman would not apply. It was important that the Senate should act immediately in reference to the State of South Carolina—he begged pardon, he meant Rhode Island.

Mr. SPRAGUE asked for the reading of the rule of the Senate which prescribes that the appointment of the committees shall be made by the President, and remarked, that, as the language was general, unless the rule had been altered by some subsequent action of the Senate, the appointment of this committee would be made by the presiding officer. He knew it had been the practice for the Senate to elect select committees when the President was in the chair.

The PRESIDENT *pro tem.* stated that it had been the practice, since he had occupied the chair, to make no distinction between the mode of appointing the standing and the select committees. Both had been appointed by the Chair.

Mr. KING made a brief reply concerning the practice of the Senate, with a view to sustain his former view.

Mr. CLAY rejoined. He was a matter of fact man; and he preferred to guide himself by facts, rather than by mere speculative lights. The Chair had stated that it had been customary for him to appoint both the standing and the select committees. He was unwilling to protract discussion; and,

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1st Session.

Debate on re-  
ferring the case  
to a committee.

if the gentleman who had submitted the resolution would agree so to modify its phraseology as to make it requisite that the committee should be elected by the Senate, he would withdraw his objection to its immediate consideration.

Mr. WRIGHT said that, when he had offered his resolution, he expected that the committee would be appointed by the Senate; and, if the gentleman from Kentucky would make the insertion of the amendment to that effect, he would pledge himself to make no objection to it. He had no desire to be a member of the committee, for it must be obvious to every gentleman that the investigation would be of a very unpleasant character.

Mr. CLAY declined putting his suggestion in the shape of an amendment; but, if the mover would modify his resolution, he would no longer object to its being taken up and acted on.

Mr. WRIGHT said he had no objection to make the modification.

The PRESIDENT *pro tem.* corrected the construction of the rule made by the Senator from Alabama. The rule had been changed, and no distinction was made between the appointment of the standing and the select committees. On this principle the CHAIR had acted during the last session.

Mr. WRIGHT then again rose, and said he desired it to be understood that he had not intended to change the form of the resolution himself; but, if an amendment should be moved, he would not object to it.

Mr. CLAY then moved to lay the resolution on the table.

The question was then put, and the motion to lay the resolution on the table was agreed to without a division.

DECEMBER 5.

Mr. WRIGHT called for the consideration of his resolution offered yesterday.

Mr. CLAY said he did not mean to interpose any objection whatever to the resolution, but, as it was the first case of the kind under the constitution, that had ever occurred, it was likely to become a precedent; and he would inquire whether it ought to be acted upon, without any claim or application for the seat having been presented: The Senate ought to know whether Mr. Potter accepts his appointment, or claims a seat in the Senate. It had been the practice in case of dispute to present a memorial claiming the seat.

Mr. WRIGHT said the case was altogether novel: unlike that of any contested election in any legislative body. But he thought the subject in its present aspect had a stronger claim to the attention of the Senate than the petition of any individual. The true question was, not whether the last Senator elect should take his seat, but whether the election of Mr. Robbins was legally void. The question of the

subsequent election would follow, and he was not disposed to go at present beyond the proper question: but he thought the importance of the subject demanded the speedy action of the Senate.

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Debate continued.

Mr. CLAY moved, as an amendment to the resolution, that the committee should be elected by the Senate.

Mr. KING, of Alabama, was opposed to the amendment, not because he was unwilling that the committee should be chosen by ballot, but because it was in contravention of the rules of the Senate, which required that the committees should be appointed by the President *pro tem*. The rules of the House could not be changed by a motion, but by a resolution offered beforehand. The remark which had been made in regard to the memorial, carried him back to what he had said before, that neither member had a right to a seat until the Senate had decided which should be received as a Senator. He asked that the action of the Senate might be as speedy as possible.

Mr. CLAY's amendment was then adopted.

Mr. POINDEXTE said that this course of proceeding did not appear to him to be regular. One gentleman had appeared before the Senate with credentials from the Governor of Rhode Island, is qualified, and takes his seat. Subsequently another presents his credentials, and asks that they may be referred to a committee. He said it was irregular so to refer them. The only regular way was to introduce a resolution to inquire whether Mr. Robbins was legally and constitutionally elected. If his election was decided to be illegal, then it would be proper to refer the subject of Mr. Potter's election to a committee. Rhode Island was already fully represented. A third Senator elect presents his credentials, and asks that they may be referred to a committee, and for what? To inquire whether a third Senator is elected from the State of Rhode Island? The proper subject of investigation was whether Mr. Robbins was duly elected. Suppose next week another person should present himself as a fourth Senator from that State, would the Senate then inquire whether he also was duly elected? He thought the question now ought to be whether Mr. Robbins is the second Senator.

The resolution was then adopted, and the committee elected were: Mr. POINDEXTE, Mr. RIVES, Mr. FRELINGHUYSEN, Mr. WRIGHT, and Mr. SPRAGUE.

MARCH 4, 1834:

Mr. POINDEXTE, from the select committee to which the subject was referred, made a report.

The report was read by Mr. P., occupying about an hour.

Mr. P. then moved the printing of the report. He stated that he believed it was the intention of the gentlemen com-

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1st Session.

On the presentation of the report.

Mr. Wright relative to the views of the minority.

posing the minority of the committee to make a counter report. He would not, therefore, name any particular day for the consideration of the report, until it should have been printed. In the mean time the minority might have the opportunity of submitting the views on the other side. He adverted to the minority report from the Committee on Manufactures, which was made to the Senate on a former occasion, but he considered that as having no bearing on this question. The gentleman who was the minority of this committee could prepare his report, unless he previously desired to ascertain whether it would be received after preparation.

Mr. WRIGHT said it would be recollected that a Senator composing one of the committee on this subject, had resigned his seat—he meant the honorable Senator from Virginia, (Mr. RIVES)—and, in consequence of that act, he remained the only member dissenting from the report which had just been presented. In justification to himself, he felt bound to state very concisely the reason why the minority of the committee, formerly consisting of two members, were not at this time prepared to give their opinions on this important question. It was now three weeks last Saturday since the committee had met, and at which time their opinions were distinctly pronounced on the subject. It was then expected that a report would be made at an earlier day. He knew, from his own experience here, and thought that Senators would agree with him, that there had not been much time to prepare the report. He, therefore, made no sort of complaint of the delay, or of the manner in which the minority had been treated by the majority. But he would say, that, according to his understanding of the case, and also that of the other member of the committee, it was necessary that they should be in possession of the report and papers of the majority, before they could present theirs. The inquiry had been conducted before the committee in a peculiar manner, and rendered this course necessary. He would further say, that, at the time of the meeting of the committee, it was arranged between the gentleman from Virginia and himself, that, when the majority should have drawn up their report, they would take their proceedings to make out theirs.

He had no reason to suppose what would be the course taken in reference to this matter, until the resignation of the Senator from Virginia. Since that period, the chairman of the committee had thought proper to occupy the whole time, as he had done for some time before, in drawing up the report of the majority of the committee. Since he (Mr. W.) had come here this morning, the committee had met, and the majority had directed the report to be presented to the Senate. He still felt himself bound, if the Senate should consider it desirable, to present the views entertained by the minority of the committee, in order that it might appre-

ciate his motives. But, if this report were not required, why, then, it would be unnecessary that he should undergo the labor of examining all the papers that were requisite to enable him to make out a report.

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Debate on the  
question whe-  
ther the mine-  
rity shall be al-  
lowed to pre-  
sent a report.

He conceived it proper to tell the Senate that he should, at an early day, have proposed to proceed to the election of another member to supply the vacancy in the committee occasioned by the resignation of the Senator from Virginia, had it not been for the fact that every member of the committee had, two weeks before this event, pronounced his opinion. It seemed to him, (Mr. W.) that, if it so happened that a new member could have been elected, he would not have been able to give much aid to the arduous labors of the committee, on account of his ignorance of the facts.

He (Mr. W.) had made these remarks so as to leave the Senate to make what disposition it chose of the whole subject. He would again repeat, that he should feel himself bound, if consistent with the practice or views of the Senate, to present to it a report of the views of the minority on this important question. If it was not consistent with its practice, and he really did not know whether it was or not, to accept such a report, then he desired to be relieved from the labor of drawing it up. He now submitted to the Senate what disposition it would make of the report which had just been presented, and whether it thought it proper that he (Mr. W.) should present his views, which, in an important point, differed from the majority. He would make no motion, for he did not feel authorized to do so. He had thought it his duty to present these views, and would merely say, that if the Senate should direct that the report of the minority be presented to it, he would prepare the report at as early a day as possible, as he could now obtain the necessary papers and documents required for that purpose. If, however, a different expression should be manifested, he should be relieved from that trouble.

Mr. CLAY said, with regard to the general question presented by the gentleman from New York, (as to the parliamentary propriety of a minority of a committee being permitted to present their views after a matter had been decided by a majority,) he had no doubt that the practice was unwarranted by the parliamentary usage of other countries; and was so by the usage of the House of Representatives, until within a few years past. He could not speak as to the practice of the Senate. He knew no instance analogous to the present case. For himself, personally, he had no objection whatever to this minority (although it consisted of one individual only) expressing its opinion. He had risen to suggest a postponement of the subject until to-morrow, when it could be fully considered and decided upon, and the Senator from New York would then know upon what grounds to act. Mr.



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to a minority  
report.

C. accordingly moved a postponement of the question for the present, that the report should be printed.

Mr. KING, of Alabama, said that until lately it had not been usual for minorities to present their views, but the practice was now permitted in the other House, and four years ago it had been followed by the Senate in the tariff question. A Senator from South Carolina then presented the report of the majority, and a Senator from New Jersey declared the sentiments of the minority. A precedent was thus established. The Senator thought it important to have the views of the minority in relation to the tariff, and he trusted that the present case, involving the right of a Senator to a seat on that floor, would not be considered less important.

Two gentlemen were contending for the seat: this was very important to the people of the State from which they came, and also to the Senate. He should vote against the motion of the Senator from Kentucky: he thought it would be better to send the matter back to the committee, and bring it forward at a subsequent period, with the views of the minority. If the report were ordered to be printed, there would be an end of the whole affair. He would move to recommit the report.

Mr. CLAY said the Senator from Alabama must have misunderstood him. He made no opposition to a declaration from the minority, but only stated that he believed such a procedure to be contrary to parliamentary law. The Hon. Senator relied upon a single precedent of the Senate. He (Mr. C.) did not think that this precedent should be allowed to settle the practice of the Senate forever. In the case referred to, the general question was not discussed.

A report had been prepared by the majority, and another by the minority, which the latter moved should be received, and the Senate upon that occasion consented. But this was not to be taken as a general rule. He had before said that he was indifferent as to the reception of a report from the minority in the present case; he should even prefer that such a report should be made, but he protested against its being made a precedent. The practice would prove very inconvenient, and was against all rule, excepting that of the House of Representatives. He would move that the subject be laid on the table till to-morrow.

Mr. POINDEXTER rose to thank the Senator from Alabama for having set him right in regard to the precedent which had been quoted. He had supposed that the report of the minority of the committee, on the memorial to reduce the tariff on imported iron, had proceeded from the Committee on Manufactures. He was perfectly willing that the minority should express their opinion.

Mr. CLAYTON wished the gentleman from Alabama to refer to certain reports, by which he would see that no such

precedent had been established. He by no means wished to deter the honorable Senator from New York from making his report; but what would be the consequence if the proposition of the Hon. Senator from Alabama should prevail? Let the report presented by the Hon. Senator be printed, and that would afford the gentleman from New York an opportunity of stating his views in the form of a speech.

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1st Session.

On the reception of the minority report.

Mr. CHAMBERS was of opinion that to refer the report back to the committee for reconsideration, would carry with it the implication that the majority of the Senate was not satisfied with the report of the majority of the committee. In the case of the precedent referred to by the gentleman from Alabama, he referred to the journals to show that when an honorable Senator wished to present the views of a minority of the committee, he was permitted to present them, not in the form of a report, but as a *paper*. He would freely extend to the gentleman from New York the privilege of presenting his views to the Senate in the shape of a paper, which paper might be printed.

Mr. CALHOUN said that, in the instance referred to, the paper was first presented as a report, in which form it was rejected; but that the form being changed, it was presented as a paper, and so received.

Mr. KING contended that the Senator from New Jersey had ultimately presented the minority's *report*. The paper commenced by saying "as a minority:" it purported to be a report, was signed as such, and received by the Senate and printed. He wished only that the views of the whole of the committee should be presented to the Senate, so that those who had not the same opportunity of examining the circumstances of the case as the committee had, might be made acquainted with the different views entertained by them. An honorable Senator had said that the Senator from New York might have an opportunity of stating his views in the form of a speech; but he wished to have them in a more tangible shape. He would withdraw his proposition, [to recommit the report,] in the hope that the Hon. Senator from New York would present the views of himself and the Hon. Senator from Virginia.

Mr. CALHOUN said that the minority report, in the case so often alluded to, was presented as a *paper*; he was in the chair at the time, and remembered the circumstance perfectly.

Mr. WRIGHT wished it to be understood that if gentlemen were under an impression that he expressed a solicitude to present a report, he must negative such an opinion. His wish was to do his duty, but he had no desire to infringe upon the rules of the Senate. He would now take occasion to say that he should feel it to be his duty, when he got possession of the papers, if the report of the majority was printed, to present his opinion.

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23d CONGRESS,  
1st Session,

Report of the  
select commit-  
tee.

The question was then taken, and the report which follows was ordered to be printed.

*Report of the Committee.*

The election of  
A. Robbins.

It appears, by the credentials of Asher Robbins, and the proceedings of the General Assembly of the State of Rhode Island, hereto appended, and marked A, that the Senate and House of Representatives of said State, then sitting in the city of Providence, met in grand committee, in conformity to the usage of the Legislature in such cases, for the purpose of choosing a Senator to represent said State in the Congress of the United States; and that, on counting the ballots, it appeared that Mr. Robbins was elected by a majority of four votes, who was thereupon declared to be duly elected a Senator to represent said State in the Congress of the United States for six years from and after the fourth day of March then next following: that, having performed the duty for which the two Houses had met, the grand committee was dissolved, and the members of each House repaired to their respective chambers. It further appears to your committee, that, on the twenty-eighth day of the same month of January, his Excellency Lemuel H. Arnold, Governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Asher Robbins as aforesaid, and caused the said commission, signed and sealed as aforesaid, to be delivered to the said Asher Robbins, which was presented to the Senate of the United States, in open session, on the fourth day of February, 1833, and, on motion, read, and entered on the journals of the Senate. By virtue of the force and effect of the aforesaid commission, the said Asher Robbins, Senator elect from the State of Rhode Island, appeared in the Senate chamber on the second day of December, 1833, was duly sworn to support the constitution of the United States, and took his seat as a member of the Senate.

Declared void  
by the Rhode  
Island Legisla-  
ture.

It further appears to your committee, that, at a subsequent session of the General Assembly of Rhode Island, begun and held at the town of South Kingston, in said State, on the last Monday of October, 1833, certain proceedings were had relative to the election of the said Asher Robbins, as above mentioned, which resulted in the adoption of a declaration or act of the said General Assembly, by which the election of Mr. Robbins is declared to be "null and void and of no effect," and the office vacated. Whereupon, at the same session of the General Assembly, the two Houses met in grand committee on the first day of November, 1833, and proceeded to elect a Senator to represent the State of Rhode Island in the Congress of the United States for the term of six years, commencing on the fourth day of March preceding, to supply the vacancy created, or supposed

to be created, by the act declaring the election of Mr. Robbins null and void: and the majority appearing to be in favor of Elisha R. Potter, the said Potter was thereupon declared to be duly elected a Senator in Congress from the said State for the term aforesaid, when the grand committee was dissolved, and the members repaired to their respective chambers. That, on the fifth day of the same month of November, his Excellency John Brown Francis, Governor of the State of Rhode Island, by commission in due form, bearing his signature, under the great seal of the State, did proclaim and make known the election of the said Elisha R. Potter as aforesaid, and cause the said commission, signed and sealed as aforesaid, to be delivered to the said Elisha R. Potter, which was presented to the Senate on the second day of December last, and on the fifth day of the same month referred to this committee. The documents relating to those proceedings are subjoined, and marked B. This statement of the case is deemed sufficient to show the questions which arise for the consideration of your committee, and which they now proceed to examine.

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1. Was the commission of Asher Robbins made and executed in conformity with the provisions of the constitution of the United States, and the laws and usages of Rhode Island prescribing the time, place, and manner of choosing Senators to Congress? Points discussed therein.

2. Was Mr. Robbins, at the time of his election, eligible, according to the constitution of the United States, to the office of Senator?

3. Was he chosen by the *Legislature* of the State of Rhode Island?

If these questions be answered affirmatively, it will be unnecessary to inquire into the validity of the subsequent election of Mr. Potter, or into the power of the Legislature to create a vacancy, by annulling the act of their predecessors; and therefore your committee limit the views which they deem it proper to take of the subject referred to them, to the objections made to the commission of Mr. Robbins, on the ground that the Legislature by whom he was chosen had no power to elect a Senator to Congress, and that the Governor who signed and sealed his commission was not, at the time, competent to exercise any power, or perform any duty, in his official character. These objections rest on the same general principle; and if they are supported by the facts disclosed in the case, connected with the constitution and laws of the State, it will *then* be proper to examine the claims of Mr. Potter to a seat in the Senate, and not otherwise.

The constitution of the United States provides that "each House shall be the judge of the elections, returns, and qualifications of its own members." Art. 1, sec. 5.

The members of the House of Representatives are to be

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chosen by the people of the several States having the qualifications requisite for electors of the most numerous branch of the State Legislature. The members of the Senate are to be chosen by the Legislatures of each State, and the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. Congress having passed no law on the subject, we must look into the statutes of the several States for those regulations, and conform our action to them. The Senators from each State are equal in number, and cannot be increased or diminished, even by an amendment of the constitution, without the consent of the States respectively. They are chosen by the States as political sovereignties, without regard to their representative population, and form the federal branch of the National Legislature. The same body of men, which possesses the powers of legislation in each State, is alone competent to appoint Senators to Congress for the term prescribed in the constitution. In the performance of this duty, the State acts in its highest sovereign capacity, and the causes which would render the election of a Senator void, must be such as would destroy the validity of all laws enacted by the body by which the Senator was chosen. Other causes might exist to render the election *voidable*, and these are enumerated in the constitution, beyond which the Senate cannot interpose its authority to disturb or control the sovereign powers of the States, vested in their Legislatures by the constitution of the United States. We might inquire, was the person elected thirty years of age at the time of his election? Had he been nine years a citizen of the United States? Was he, at the time of his election, a citizen of the State for which he shall have been chosen? Was the election held at the time and place directed by the laws of the State? These are facts capable of clear demonstration by proofs; and in the absence of the requisite qualifications in either of the specified cases, or if the existing laws of the State regulating the time and place for holding the election were violated, the Senate, acting under the power to judge of "the elections, returns, and qualifications of its own members," might adjudge the commission of the person elected void, although in all other respects it was legal and constitutional. But where the sovereign will of the State is made known through its Legislature, and consummated by its proper official functionaries in due form, it would be a dangerous exertion of power to look behind the commission for defects in the component parts of the Legislature, or into the peculiar organization of the body, for reasons to justify the Senate in declaring its acts absolutely null and void. Such a power, if carried to its legitimate extent, would subject the entire scope of State legis-

lation to be overruled by our decision, and even the right of suffrage of individual members of the Legislature, whose elections were contested; might be set aside. It would also lead to investigations into the motives of members in casting their votes, for the purpose of establishing a charge of bribery or corruption in particular cases. These matters, your committee think, properly belong to the tribunals of the State, and cannot constitute the basis on which the Senate could, without an infringement of State sovereignty, claim the right to declare the election of a Senator void, who possessed the requisite qualifications, and was chosen according to the forms of law and the constitution.

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These general views are offered to show that contested elections in the popular branch of Congress, where the people exert, in their primary capacity, the right of suffrage under various limitations and restrictions in the choice of Representatives from certain prescribed districts, open a much wider field of inquiry and investigation than a like contest for a seat in the Senate, which is a body wholly federative in its character and organization, and whose members hold their appointments from, and represent, the States as political sovereignties. Your committee having regard to these rules as applicable to all contested elections in the Senate, proceed to apply them to the case now under consideration.

It is admitted that the sitting member, Asher Robbins, possesses all the qualifications required by the constitution of the United States to be a Senator in Congress, and that his commission, as such, is in due form, according to the laws and usages of Rhode Island. These points being conceded, the remaining and the only question to be decided, is, was the body by which he was chosen a Senator, the *Legislature* of Rhode Island? or was it merely an assemblage of citizens without authority to pass laws, prescribing that which is right, and prohibiting that which is wrong, to the people of the State? On this ground both parties seem content to rest their claims to a seat in the Senate.

Mr. R. was  
qualified—his  
commission was  
in due form,  
&c.

The General Assembly of Rhode Island, as at present organized, consists of two separate and distinct branches: the Senate, over which body the Governor presides, and the House of Representatives—each chosen by the people of the State, who are freemen or freeholders, and entitled to vote at elections. The Governor and Senate are elected annually. The members of the House of Representatives semi-annually. To constitute a Legislature capable of enacting laws, or performing any other duty confided to that body by the constitution of the State or of the United States, it is essential that there should be in existence, at the same time, a Governor, or some officer authorized to perform the executive functions; a Senate, and House of Representatives. In the absence of either, the other branches could not perform any act which would be obligatory on the people



1834. of the State. We are then brought to the inquiry whether  
 23d Congress, these component parts of the Legislature of Rhode Island  
 1st Session. were assembled at Providence, in January, 1833, when Mr.  
 Report of the Robbins was elected in grand committee a Senator to Con-  
 committee. gress. It is alleged, on the one hand, that the Governor and  
 Senate had ceased to exist in the month of May, 1832, by  
 the expiration of the term of one year for which they had  
 been elected, and the failure of the people to elect their suc-  
 cessors by a majority of all the votes given in, according to  
 the constitution and laws of the State. On the other, it is  
 maintained that the powers of the Governor and Senate were,  
 by law, extended until their successors should be duly chosen  
 and engaged, for which purpose special elections were or-  
 dered and held, but without success, prior to the time at  
 which Mr. Robbins was elected. For the purpose of form-  
 ing a correct judgment of this anomaly in the constitution of  
 the State, it is necessary to recur to the ancient charter of  
 Charles the Second of England, granted to the colony of  
 Rhode Island and Providence Plantations in 1663, which  
 has not been superseded by a written constitution since the  
 revolution; and to the various laws which have been enacted,  
 modifying the provisions of that charter in such manner as  
 to adapt it to the condition and convenience of the people  
 of the State. By the charter, certain political powers, rights,  
 and privileges, are granted to the inhabitants of the colony,  
 among which are the following:

“And, further, we will and ordain, and by these presents,  
 for us, our heirs, and successors, do declare and appoint,  
 that, for the better ordering and managing of the affairs of  
 the said company and their successors, there shall be one  
 Governor, one Deputy Governor, and ten assistants, to be  
 from time to time constituted, elected, and chosen, out of the  
 freemen of the said company for the time being, in such  
 manner and form as is hereafter in these presents expressed;  
 which said officers shall apply themselves to take care for  
 the best disposing and ordering of the general business and  
 affairs of and concerning the lands and hereditaments here-  
 inafter mentioned to be granted, and the plantation thereof,  
 and the government of the people there.”—*Charter of R. I.*  
*page 6, Digest, 1822.*

“And that forever hereafter, twice in every year, that is  
 to say, on every first Wednesday in the month of May, and  
 on every last Wednesday in October, or oftener in case it  
 shall be requisite, the assistants, and such of the freemen of  
 the said company, not exceeding six persons for Newport,  
 four persons for each of the respective towns of Providence,  
 Portsmouth, and Warwick, and two persons for each other  
 place, town, or city, who shall be from time to time there-  
 unto elected or deputed by the major part of the freemen of  
 the respective towns or places for which they shall be so  
 elected or deputed, shall have a general meeting or assem-

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bly, then and there to consult, advise, and determine in and about the affairs and business of the said company and plantations. And, further, we do, of our especial grace, certain knowledge, and mere motion, give and grant unto the said Governor and company of the English colony of Rhode Island and Providence Plantations in New England, in America, and their successors, that the Governor, or, in his absence, and by his permission, the Deputy Governor of the said company for the time being, the assistants, and such of the free-men of the said company as shall be so as aforesaid elected or deputed, or so many of them as shall be present at such meeting or assembly as aforesaid, shall be called the General Assembly; and that they, or the greatest part of them then present, whereof the Governor or Deputy Governor, and six of the assistants, at least to be seven, shall have, and hereby have, given and granted unto them full power and authority, from time to time, and at all times hereafter, to appoint, alter, and change such days, times, and places of meeting and General Assembly, as they shall think fit, &c." \* \* \* \* \*

*"And from time to time to make, ordain, constitute, or repeal, such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall inhabit; or be within the same, so as such laws, ordinances, and constitutions so made be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there."*—*Digest of 1822, pages 6, 7, & 8 of Charter.*

*"And, further, our will and pleasure is, and we do hereby, for us, our heirs and successors, establish and ordain, that yearly, once in the year forever hereafter, namely, the aforesaid Wednesday in May, and at the town of Newport, or elsewhere, if urgent occasion do require, the Governor, Deputy Governor, and assistants of the said company, and other officers of the said company, or such of them as the General Assembly shall think fit, shall be, in the said General Court or Assembly to be held from that day or time, newly chosen for the year ensuing by such greater part of said company for the time being as shall be then and there present."*—*Digest of 1822, page 9 of the Charter.*

These extracts from the charter will serve to show the original structure of the Government of Rhode Island and Providence Plantations. The charter provides that the Governor, Deputy Governor, and assistants shall be chosen annually on the first Wednesday of May in each and every year, by a majority of the company, at Newport. The de-

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puties to the General Assembly were to be chosen in the several towns for which they were elected semi-annually, and to assemble on the first Wednesday in May, and the last Wednesday in October, or oftener, in case it should be requisite, at such place as might be designated by law. The Governor, Deputy Governor, assistants, and deputies, as organized under the charter, formed one body, which is called the General Assembly.

The unlimited power granted to this body to repeal or modify the existing regulations for the government of the colony, or to adopt such new regulations as might be deemed expedient for the convenience of the people, has been exercised from time to time before and since the revolution, when Rhode Island became one of the States of the Union. These modifications have materially changed the provisions of the charter, and established fundamental principles of government, inconsistent with those recognised and ordained by the charter, which now remains only the nominal foundation of the legislation of the State. Your committee think it necessary to present a summary of these interpolations on the charter, as they furnish a practical illustration of the powers claimed and exercised in this respect by the General Assembly of Rhode Island, the validity of which does not seem to have been at any time questioned.

1. By the last clause of the charter above cited, the election of Governor, Deputy Governor, and assistants, is required to be made at Newport on the first Wednesday of May in each year, by the whole body of the freemen of the company assembled at that place in person. This is the literal requirement of the charter, and was made, we presume, in conformity to analogous customs in England and Wales in the elections for counties and boroughs. The difficulty of convening the freemen from the different towns of the colony at the season indicated, and the expense and inconvenience attending their assemblage at Newport for an uncertain length of time until an election could be effected, very speedily suggested a modification of this requirement. As early as October 26, 1664, a little more than one year after the reception of the charter, after stating the inconveniences attending a personal voting at Newport, the General Assembly ordained, that "voting by proxces be enjoyed by all the freemen of this collony, and that each freeman desiering to vote by proxy shall subscribe their names on the outside, and deliver his votts sealed up into the hands of a majes- trate in the face of a towne metting lawfully called, and notice given for that porpose \* \* \* \* \* which sayd votts shall be, by such whome the General Assembly shall appoynt, opened and delivered forth as the respective choice of the several votts shall requier; provided that this order shall noe way prejudice or discouradge any who desier to be personally present."—*Ancient Records*, p. 256.

This palpable departure from the original provisions of the charter continued to be the law of Rhode Island for nearly a century, viz. until August, 1760, when a different arrangement was substituted, but still more manifestly departing from the literal requirements of that instrument.

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2. As stated in our remarks immediately following the passages of the charter above cited, the General Assembly of the colony was constituted into one body, consisting of a Governor, Deputy Governor, and ten assistants, and so many deputies elected from the freemen of the several towns as are specifically stated in the second of those quotations. This single body was invested with all the powers, legislative and judicial, which the clauses of the charter enumerate, and acted as a single body, determining its acts by a majority of voices for the three successive years subsequent to its creation by charter. In March 27, 1666, at the suggestion of the towns of Portsmouth and Warwick, an act passed the General Assembly, "concerning deputies sitting apart." After stating the inconveniences of a single Assembly, they enact and declare that "it is freely agreed that the request of the towns aforesaid be granted, and ordered that the magistrates" (gov., dep'y gov., and assistants) "sit by themselves, and the deputies by themselves; and that each House soe sitting have equal power and priviledge in the proposing, composing, and propogating any act, order, and law in Generall Assembly, and that nether House in Generall Assembly shall have power, without the concurrence of the majour part of the other House, to make any law or order to be accounted as an acte of the Generall Assembly."—*Ancient Records*, p. 298.

This law of the Assembly of 1666, and not the charter, is the whole basis of the present organization of the Legislature of Rhode Island, which consists, as we have before stated, as at present constituted, of two branches—a Senate and a House of Representatives, each armed with a negative upon the other.

3. The act of August, 1760, is another and remarkable departure from the literal requirements of the charter of King Charles. By the charter itself, the whole body of freemen of the colony were to assemble, in person, at Newport, and to elect, by a major vote of the company, the Governor, Deputy Governor, and assistants. The law of October, 1664, relaxed this provision, and substituted a mixed system of voting for these officers, partly in person, and partly by proxy. This continued to be in force until the session of the General Assembly in August, 1760, when a law was passed entitled "An act regulating the general election." In the preamble to this act, it is set forth "that it is found; by long experience, the freemen going to Newport to put in their votes for general officers at the elections is very injurious to the interest and public weal of the colony; \* \* \* and that

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all the ends of voting may be as fully attained by the freemen's putting in their proxy votes at the town meeting in their own towns, appointed by law for that purpose, agreeably to the ancient and laudable custom of most of the prudent freemen. Therefore,

"*Be it enacted*, That, for the future, every freeman who is disposed to give his suffrage at the election of general officers in this colony, shall do it by putting in a proxy vote in the town meeting *in the town* to which he belongs, on the third Wednesday of April next preceding the general election, agreeably to the law and well-known custom of proxying; and no freeman shall be permitted to vote for general officers at the general election held at Newport on the first Wednesday in May; but only such as be members of the General Assembly."—Thus, by this act of the Legislature, the whole system of voting laid down by the charter is radically altered. The assembling of the freemen of the colony at Newport on the first Wednesday in May, as the charter prescribes, is entirely abrogated; the mixed method of voting, partly in person and partly by proxies sent to Newport from the other towns of the colony, is also modified; and the whole system is changed to the law as it now stands, with very slight variations, viz. that the freemen, on the third Wednesday of April in each year, in their *several towns*, shall proceed to elect a Governor, Deputy Governor, and assistants, and not in one body assembled in Newport on the first Wednesday in May.

The law of 1760 was deficient in one important particular, which the act of January, 1832, (the particular act now complained of) was intended to remedy. Formerly, and from the reception of the charter until August, 1760, a failure to elect general officers was a contingency not to be apprehended, because the freemen assembled at Newport would continue assembled and voting until a choice was effected. But, by the act of August, 1760, the freemen were to vote *in separate towns*, and the votes thus given having been transmitted to Newport, were counted in the presence of the Governor and assistants of the former year, in convention with the deputies then recently elected. If it appeared, on counting, that there was no choice by the major part of the freemen, there was no provision in this act for a second trial for these offices *in the separate towns*; and the body of the freemen not being assembled in Newport, it was impossible to go on in the ancient method, and continue to vote till the choice was consummated. If the requirements of the charter, and the usages under it, had been strictly complied with, the body of the freemen would have appeared at Newport, the Governor and assistants of the former year would have presided in the election, and the voting would have gone on until an election was completed. The act of August, 1760, having changed this arrangement in the

manner above stated, all that the act of January, 1832, did, was to follow out its provisions, and to declare that the Governor and assistants of the former year should hold over, while other trials were had *in the separate towns*, and until an election of general officers was effected by those trials, exactly as they would have held over if the election had been made by the body of the freemen assembled at Newport. But of the character of this act your committee will speak more particularly hereafter.

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4. Your committee will barely advert to two other acts of the Legislature of Rhode Island, which conflict more or less with the provisions of the charter, but whose validity they believe has never been disputed; such as the act devolving the powers and duties of Governor on a person who had never been elected by the freemen to that office, in certain cases; also, the act authorizing the Governor, in certain events, to appoint times and places of the meeting of the General Assembly, although the charter provides that the Assembly itself shall appoint such times and places; both these acts being embodied in "the act to provide for the performance of the duties of the Governor in certain cases, and also for regulating the sitting of the General Assembly."—*Digest of 1822*, p. 99.

One other act of the General Assembly deserves notice in this connexion, as illustrating, in a striking manner, the peculiar character of legislation in Rhode Island. The bill of rights, which, in all the other States, emanates from the people in their primary capacity, in this State is incorporated into its code of statutes in the form of an act declaratory of the rights of the people.

The foregoing review of the innovations made from time to time, during the existence both of the colonial and State Governments of Rhode Island, on the provisions of the charter conferring on the people political rights, demonstrates the power claimed and exercised by the General Assembly to alter or modify, without restraint, the fundamental principles of the form of government transmitted to them by the King of Great Britain. This power has never been denied either in reference to its validity or extent. The right of suffrage has been extended to a class of citizens who did not enjoy it under the charter; the elections directed to be held at Newport on the first Wednesday of May in each year, are held throughout the State on such days and at such places as are provided for by law; the manner of holding and conducting elections, and of returning the votes, is changed; the General Assembly is divided into two separate branches, each having a negative on the action of the other, contrary to the charter by which it is constituted into one body; a bill of rights, which properly belongs to the constitutions of the several States as a part of the fundamental law, has been given to the people of Rhode Island by a simple act of legis-



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lation. These, and many other primary principles, are to be found in the code of statute laws of that State, while, of the ancient charter, there seems to be scarcely a vestige remaining untouched, except that clause which prohibits the enactment of any law contrary to the laws of England, and this became obsolete by virtue of the revolution.

The people of the State have ratified all these changes, not only by their silent acquiescence, but by their positive sanction. The power to make them was necessary to the welfare of the people, and was wisely reserved in the precise words of the charter. Your committee can perceive nothing in the act of January, 1832, entitled "An act in addition to an act entitled an act regulating the manner of admitting freemen, and directing the method of electing officers in this State," which assumes a power different in its character from that which had been previously recognised as appertaining to the General Assembly. The necessity of proper precautions to prevent an *interregnum* in the Government of the State was seen and duly considered by the Legislature. They believed it to be not only possible, but highly probable, that the people might fail at the regular annual election to choose a Governor, Lieutenant Governor, and a sufficient number of Senators, to form a constitutional quorum for the transaction of business. The result proves that this apprehension was well founded. The first section of the act declares, that, in case there be no choice of a Governor at an annual election, the House of Representatives shall order a new election for the choice of a Governor; and that, in case no choice should then be made, the order shall be renewed as often as the votes are returned to the General Assembly, until a Governor be elected, or until such proceedings shall become unnecessary by reason of the provision of law for the next annual election; and in the meantime that the Governor of the preceding year shall continue, under his former engagement, to exercise all the powers, and perform and execute all the functions or duties of the office of Governor until another shall be elected and engaged in his place, and shall receive such proportion of the salary as corresponds with the time he shall so serve. The same provisions are made as to the Lieutenant Governor, and all the other general officers, in case of a like failure to elect those officers at the annual election. The third section of the act relates to the choice of Senators, (assistants,) and directs that new elections shall be ordered as in the cases above mentioned, and with the same limitations, unless six Senators, being the requisite number to form a quorum, shall have been chosen at the annual election. The contingencies intended to be provided against by this act, actually occurred. No Governor nor Lieutenant Governor was chosen to succeed those of the past year; the number of Senators required for a quorum were not elected by the people; and,

in compliance with the provisions of the act, new elections were ordered by the House of Representatives, where a failure to elect had happened, until, in the judgment of that House, "such proceedings had become unnecessary, by reason of the provision of law for the next annual election."

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The General Assembly, in the mean time, as at that time constituted, continued to perform all the functions which properly belong to that body, until the end of the session at Providence, January, 1833. It remains then to be inquired, was this body so assembled the *Legislature* of Rhode Island? The law, by virtue of which they continued to exercise the powers of legislation, is said to be repugnant to the charter, and therefore void. If this be a sound objection, it at once annuls every part of their proceedings, and, as a necessary consequence, that of choosing a Senator in Congress.

Your committee are unable to find any clause in the charter which forbids the exercise of such a power as that claimed by the passage of the act of January, 1832. It seems, on the contrary, to have been the intention of the Crown to perpetuate the existence of the legislative power in the colony by an express provision—that the authority, office, and power of the Governor, Deputy Governor, and assistants, shall cease and determiné when their successors shall be elected and engaged, and not at the expiration of the term for which they were respectively chosen. The construction of this clause of the charter has been uniform from the commencement of the Government up to the present time.

The Governor, Deputy Governor, and Senators, (assistants,) of the preceding year, at the opening of each annual session of the Legislature in May, take their seats, and join the House of Representatives in grand committee, and continue to act until their successors are engaged. This is abundantly sufficient to prove that they hold over, as a matter of course, for the purpose of organizing the members newly elected to succeed them; and it does not seem to be material whether the time required for the performance of this duty be one or more days; for the same principle under which they hold over for a single day would apply to a longer time, if it should be required to complete the organization. But it is not necessary to resort to this provision of the charter, or to the practice under it, to establish the validity of the power to pass the act of January, 1832. The general power given in the charter to the Legislature, "from time to time to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet," without limitation, is broad enough to cover the whole ground assumed in justification of that act. If Rhode Island had followed the example of her sister States of the Union, and adopted a written constitution, it will not be denied that this power to continue in existence the legislative body until their succes-

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sors should be chosen and engaged, might have been given in that instrument. Shall we then deny to her the right to effect the same object by law, when the people have, by a long and uninterrupted acquiescence in that mode of fixing the fundamental principles of the Government, imparted to such laws the force and efficiency of a constitutional provision emanating from a convention chosen for that special purpose? Your committee hold it to be an undeniable principle, applicable to all forms of Government, that there must exist in the supreme legislative power of the State a capacity to preserve itself from annihilation. Waiving, therefore, all the considerations arising out of the charter, and the immemorial usage of the State, which might be safely relied upon to justify the act in question, there are other grounds on which the exercise of the power claimed may be sustained and vindicated. The constitutions of the several States are, in the broadest sense, *popular*, emanating directly from the people, and subject to be modified and amended as the people may think proper. The legislative power embraces every object without distinction, which is not expressly prohibited by a declaration of rights, or an article of the constitution. The structure of the State Governments differs in this important respect from the Government of the United States, which is restricted in its sphere of action to the delegated powers, and such as are necessary and proper to carry them into effect. On this principle, the Legislature of Rhode Island, in the absence of a written constitution, could only be restrained in the extent of its powers by some negative provisions of the charter or of the bill of rights subsequently adopted for the better security of the people in the enjoyment of liberty. In neither of these, nor in any other act or instrument now in force, is there to be found any prohibition of the power to continue over an existing Legislature until their successors shall be duly chosen and engaged. The act of January, 1832, was deemed to be necessary to preserve the Government from dissolution, and to provide for new and extraordinary elections by the people. It has been sanctioned by the people by their action under it, in their primary capacity, and by the constituted authorities of their State in the several departments. All the laws, either of a private or general nature, passed by the Legislature at their several sessions from the first Wednesday of May, 1832, to the close of the session in January, 1833, are now in full force and operation. The highest judicial tribunal of the State was composed of judges elected in grand committee of the two Houses at the August session, 1832; and their commissions were issued under the great seal of the State, and the signature of the Governor, who was continued in office by the provisions of the act of January, 1832.

Your committee could not expect to find evidence more satisfactory of the character of the body by which Asher

Robbins, the sitting member, was elected a Senator to Congress in January, 1833.

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The constitution of the United States expressly declares that "the Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof;" but what is the definition of the term Legislature? Both its literal and technical meaning is, "the power that makes laws." It is the highest attribute of sovereignty, and merges all other powers when it does not transcend the limitations contained in the fundamental constitution of the State. When, therefore, we find that, during the existence of the General Assembly, one branch of which was continued and held their seats by virtue of the law of January, 1832, this Legislature passed fourteen laws of a general nature, and twenty-eight private acts, many of them acts of incorporation, besides numerous resolutions on various subjects falling within the range of legislative power, a schedule of which is hereunto annexed, marked C; and when these laws and resolutions remain on the statute book of Rhode Island in full force and effect, sanctioned by judicial decisions, and tacitly submitted to by the people over whom they operate, it would seem to your committee a very dangerous assumption of power in one branch of Congress, or even in every department of the General Government combined, to interfere with the internal regulations of the State, and to denounce the body by which these laws and resolutions were passed as a mere assemblage of citizens without any public authority whatever, and not the Legislature of the State. Such a power does not belong to the Federal Government, and would, if claimed and carried out to its full extent, annihilate all the reserved rights of the States. It is a general principle of national law, applicable to all distinct and independent Governments, that if there arise any disputes in a State on the fundamental laws and public administration, or on the prerogatives of the different powers of which it is composed, it is the business of the State alone to judge and determine them in conformity to its political constitution. No Government has a right to intrude into the domestic affairs of another State, and attempt to influence its deliberations or to control its action. This principle is recognised in the constitution of the United States, by which the respective States united and formed themselves into a Federal Republic. Conceding, as we feel bound to do, to the State of Rhode Island, in common with all the other States of the Union, the power to decide for itself all questions relating to its domestic policy, there would seem to be no ground on which to rest a doubt that she has decided, in the most solemn manner, the character and powers of the body by which Mr. Robbins was chosen a Senator to Congress. They passed numerous laws which are in full force. They elected judges of the Supreme Court of the State, who have taken a new engagement or oath of office,

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sors should be chosen and engaged, might have been given in that instrument. Shall we then deny to her the right to effect the same object by law, when the people have, by a long and uninterrupted acquiescence in that mode of fixing the fundamental principles of the Government, imparted to such laws the force and efficiency of a constitutional provision emanating from a convention chosen for that special purpose? Your committee hold it to be an undeniable principle, applicable to all forms of Government, that there must exist in the supreme legislative power of the State a capacity to preserve itself from annihilation. Waiving, therefore, all the considerations arising out of the charter, and the immemorial usage of the State, which might be safely relied upon to justify the act in question, there are other grounds on which the exercise of the power claimed may be sustained and vindicated. The constitutions of the several States are, in the broadest sense, *popular*, emanating directly from the people, and subject to be modified and amended as the people may think proper. The legislative power embraces every object without distinction, which is not expressly prohibited by a declaration of rights, or an article of the constitution. The structure of the State Governments differs in this important respect from the Government of the United States, which is restricted in its sphere of action to the delegated powers, and such as are necessary and proper to carry them into effect. On this principle, the Legislature of Rhode Island, in the absence of a written constitution, could only be restrained in the extent of its powers by some negative provisions of the charter or of the bill of rights subsequently adopted for the better security of the people in the enjoyment of liberty. In neither of these, nor in any other act or instrument now in force, is there to be found any prohibition of the power to continue over an existing Legislature until their successors shall be duly chosen and engaged. The act of January, 1832, was deemed to be necessary to preserve the Government from dissolution, and to provide for new and extraordinary elections by the people. It has been sanctioned by the people by their action under it, in their primary capacity, and by the constituted authorities of their State in the several departments. All the laws, either of a private or general nature, passed by the Legislature at their several sessions from the first Wednesday of May, 1832, to the close of the session in January, 1833, are now in full force and operation. The highest judicial tribunal of the State was composed of judges elected in grand committee of the two Houses at the August session, 1832; and their commissions were issued under the great seal of the State, and the signature of the Governor, who was continued in office by the provisions of the act of January, 1832.

Your committee could not expect to find evidence more satisfactory of the character of the body by which Asher





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and accepted new commissions from the Governor ; entered on their official duties, and condemned to death a citizen found guilty of a capital offence against the laws of the State. They received compensation out of the treasury of the State for their services, and disbursed the public money necessary for the support of the Government. No question has arisen touching or impugning the validity of any one of these acts, because they were passed or performed by an incompetent body, with the single exception of the attempt made by a succeeding Legislature to vacate the election of Mr. Robbins. Your committee cannot omit to refer to the preamble of the act annulling that election, in which the Legislature fully recognise their predecessors as "the General Assembly" of the State. The only ground assumed to justify the act declaring the election null and void, is comprised in a single sentence of the preamble, in the following words :

"Whereas the General Assembly which elected Asher Robbins a Senator to the Senate of the United States on the nineteenth day of January last, *did not comply with the provisions of an act* entitled "An act in addition to an act entitled 'An act regulating the manner of admitting freemen, and directing the method of electing officers in this State,' " by virtue of which the members of one branch of said Assembly then held their offices, *but proceeded prematurely therein*, and the said election is *therefore* void, and ought so to be declared by this Assembly: Therefore, Be it enacted, &c."

Again : The same Legislature, at their session held in May, 1833, passed an act to repeal the law of January, 1832, in the ordinary form, but express no opinion that the law so repealed was null and void, and thereby admit its validity up to the date of the repealing act. It is worthy of remark, also, that the same Legislature, at the session held in October, 1833, passed a special act to carry into effect an act of the Legislature passed in January, 1833, changing the mode of electing representatives to Congress, and declaring that a plurality of votes should in future decide the election in certain cases, contrary to the former and long established law of the State, by which a majority of all the votes polled at any such election was necessary to a choice in all cases. Thus the power of the Legislature assembled in January, 1833, to enact this important law, is fully acknowledged and conceded by their successors, while their power to elect a Senator to Congress is denied, and declared null and void. Your committee advert to these acts as conclusive in reference to the character of the body of men which elected Mr. Robbins. If they were competent to bind the people of the State by general laws, which is nowhere contested, they could only exercise such a power in their capacity as the Legislature of the State, and, as such, it was their constitutional right and incumbent duty to choose a Senator to Congress. There was but one Governor and but one Senate in the State claim-

ing to be a part of the General Assembly. If there had existed another body of men, however chosen, contending for the offices of the Governor and Senators in the State, it will not be denied that their respective rights might be the subject of inquiry in deciding a contested election in the Senate of the United States. But in the absence of any such conflicting claims to these offices, when only one legislative body was known in the State, which exercised all the power, and performed all the functions of the Legislature, and whose acts have in every form, and by every department of the Government, been declared valid, it would seem to be a palpable invasion of the sovereignty of the State to abrogate its laws, and overthrow its Government, by denying that a body capable of exercising the powers of legislation existed in the State after the term for which a Governor, Lieutenant Governor, and Senators, chosen at the annual election in April, 1831, had expired. To annul the election of Mr. Robbins would involve all these absurdities, and must be productive of confusion and anarchy in the State of which he has been chosen a Senator in Congress.

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*The time* at which the election took place, and *the manner* in which it was conducted, were in strict conformity to the laws of Rhode Island. The two Houses met in grand committee according to law, at the session of the General Assembly next preceding the expiration of the term of service of Asher Robbins, then a Senator in Congress, and elected him for another term of six years, to commence on the third day of March, 1833, and then the grand committee assembled for this purpose was dissolved. The choice was made by the *Legislature* of the State, whose laws are held to be valid and binding throughout the State; they command and receive obedience from the people. No objection is made, or can be made, either to *the time or manner* of the election. The Senator elected has all the requisite *qualifications* demanded by the constitution, and his *commission or credentials* were, *in due form*, delivered to him, and presented to the Senate. Your committee hold this to be a vested right, the obligation and effect of which no subsequent Legislature of that State could impair; still less had they authority to proceed to the election of another Senator, until the seat of the Senator elect had been vacated by a solemn decision of the Senate of the United States. With these views of the subject referred to them, your committee recommend the adoption of the following resolution:

*Resolved*, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate."

Resolution in  
favor of Mr.  
Robbins.

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Election of Mr.  
Robbins.

A.

STATE OF RHODE ISLAND, &c.

*Saturday, January 19, 1833.*

In grand committee, elected Asher Robbins Senator in Congress for six years from the fourth of March next.

Robbins 41: . . . Potter 25: . . . Pearce 12.

Grand committee rose.

True copy from Senate Journal.

HENRY BOWEN, *Secretary.*

**CREDENTIALS OF THE HON. ASHER ROBBINS.**

By his Excellency Lemuel H. Arnold, Governor, captain general, and commander in chief of the State of Rhode Island and Providence Plantations:

His credentials.

Be it known that Asher Robbins, of Newport, in the State aforesaid, qualified, according to the constitution of the United States, for a Senator in the Congress thereof, was, by the Legislature of said State, at the session thereof holden by adjournment, at Providence, on the second Monday of January instant, elected a Senator from said State in the Congress of the United States, for six years, commencing on the fourth of March next.

In testimony whereof, I have hereunto set my hand, and caused the seal of said State to be affixed, this [L. s.] twenty-eighth day of January, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-seventh.

LEMUEL H. ARNOLD.

By his Excellency's command:

HENRY BOWEN, *Secretary of State.*

**VACATING ACT.**

*State of Rhode Island and Providence Plantations, in General Assembly, October Session, A. D. 1833.*

Act for vacat-  
ing his election.

Whereas the General Assembly which elected Asher Robbins a Senator to the Senate of the United States on the nineteenth of January last, did not comply with the provisions of an act entitled "An act in addition to an act regulating the manner of admitting freemen, and directing the method of electing officers in this State," by virtue of which the members of one branch of said Assembly then held their offices, but proceeded prematurely therein, and the said election is therefore void, and ought to be so declared by this Assembly: Therefore,

*Be it enacted by the General Assembly, and by the authority thereof it is enacted,* That the said election be, and the same is hereby declared to be null and void, and of no effect; and the office is hereby declared to be vacant.

True copy of record. Witness:

HENRY BOWEN, *Secretary.*

By his Excellency John Brown Francis, Governor, captain general, and commander in chief of the State of Rhode Island and Providence Plantations :

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Be it known that the name " Henry Bowen," to the aforewritten attestation subscribed, is the proper handwriting of Henry Bowen, Esquire, who, at the time of subscribing the same, was Secretary of the State aforesaid, duly elected and qualified according to law: wherefore, unto his said attestation full faith and credit are to be rendered.

In testimony whereof, I have hereunto set my hand, and caused the seal of said State to be affixed, at  
[L. s.] Providence, this fifteenth day of November, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

JOHN BROWN FRANCIS.

By his Excellency's command :

HENRY BOWEN, *Secretary.*

### B.

#### CREDENTIALS OF ELISHA R. POTTER.

By his Excellency John Brown Francis, Governor, captain general, and commander in chief of the State of Rhode Island and Providence Plantations :

Be it known that Elisha R. Potter, of South Kingston, in the State aforesaid, qualified, according to the constitution of the United States, for a Senator in the Congress thereof, was, by the Legislature of said State, at the session thereof holden at South Kingston on the last Monday in October last, elected a Senator from said State in the Congress of the United States, for six years, commencing the fourth day of March last. Mr. Potter's credentials.

In testimony whereof, I have hereunto set my hand, and caused the seal of said State to be affixed, at  
[L. s.] Providence, the fifth day of November, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

JOHN BROWN FRANCIS.

By his Excellency's command :

HENRY BOWEN, *Secretary.*

### C.

*Public acts passed by the General Assembly of Rhode Island and Providence Plantations from May, 1832, to the close of the session, January, 1833.*

1. An act relating to the Burrillville bank.
2. An act authorizing the city council of the city of Providence to appoint a larger number of members of engine company No. 5.

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3. An act relating to the overseers of the poor, and to the asylum, in the town of Portsmouth.

4. An act in relation to the returns of certain justices of the peace.

5. An act in further amendment of an act to establish public schools.

6. An act in addition to the acts in relation to quarantine, and to the introduction and spreading of contagious and infectious sickness in this State.

7. An act authorizing certain military officers to be engaged in their commissions.

8. An act in addition to an act entitled an act appointing the several town councils in this State boards of health *ex officio*.

9. An act (Nov., 1832,) in amendment of an act entitled an act relative to the election of Senators and Representatives to represent this State in Congress, and of electors for the election of a President and Vice President of the United States.

10. An act authorizing certain military officers to take their engagements or their commissions.

11. An act to prevent hogs going at large in Washington village, in Coventry.

12. An act in relation to extra-judicial oaths.

13. An act (January, 1833,) in amendment of an act entitled an act relative to the election of Senators and Representatives to represent this State in Congress, and of electors for the election of a President and Vice President of the United States.

14. An act regulating criminal process in certain cases.

*Private acts passed by the General Assembly of the State of Rhode Island and Providence Plantations from May, 1832, to the close of the session, January, 1833.*

1. An act to incorporate certain persons as a society, by the name of St. James Church, at Wornsocket Falls, in Smithfield.

2. An act to legitimate Maria, the daughter of Thomas A. and Mary Ann Potter.

3. An act to authorize Henry Yates and Archibald McIntyre to put forth a lottery for the benefit of public schools.

4. An act to incorporate the Greenville Fire Engine Company.

5. An act to revive the charters of certain military companies.

6. An act to incorporate the Providence Steamboat Company.

7. An act to incorporate the Phoenix Iron Foundry.

8. An act to revive the charters of certain military companies.

9. An act to amend the charter of the Providence Marine Corps of Artillery. 1834.  
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10. An act in amendment of an act incorporating a society by the name of the Pawcatuck Academy Company.

11. An act to incorporate the New York, Providence, and Boston Railroad Company.

12. An act to incorporate the Rhode Island and Connecticut Railroad Company.

13. An act to authorize the corporation of St. John's Church, in Providence, to tax the pews in said church.

14. An act in addition to an act entitled an act to incorporate certain persons by the name of the "First Universalist Society, in the town of Providence."

15. An act to authorize John A. Grace to hold, convey, and transmit real estate in this State.

16. An act to incorporate the Albion Village Fire Engine Company.

17. An act to incorporate the Commercial Insurance Company, in Newport.

18. An act to authorize John Chatburn to hold, convey, and transmit real estate.

19. An act to incorporate the Warren Rhode Island Seamen's Friend Society.

20. An act in amendment of an act entitled an act to incorporate the Rhode Island and Connecticut Turnpike Corporation.

21. An act to authorize John Paine and Daniel Burgess to put forth a lottery for the benefit of public schools.

22. An act to incorporate certain persons by the name of the First General Baptist Church, in Warwick.

23. An act to revive an act in amendment of an act to incorporate the Providence and Boston Railroad Company; and for other purposes, and in amendment thereof, and in addition thereto.

24. An act to incorporate certain persons by the name of the Wornsocket Falls Baptist Society.

25. An act to incorporate the Gloucester and Burrillville Safeguards.

26. An act to incorporate the stockholders of the West Greenwich Farmers' Bank, in the town of West Greenwich.

27. An act to incorporate the stockholders of the Commercial Bank, in the city of Providence.

28. An act to incorporate the stockholders of the Citizens' Union Bank.

In addition to the above, the same General Assembly, from May, 1832, to January, 1833; inclusive, passed

*Thirty-one votes or resolutions* liberating the persons, or commuting the punishments, of convicts.

*Thirty-seven votes or resolutions* authorizing the sales of real estates.



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*Three resolutions* authorizing persons to apply to the Supreme Court for decrees of divorce.

*Six votes or resolutions* releasing the persons of insolvent debtors on giving bond, &c.

*A resolution* for the payment of the salaries of the Governor and Lieutenant Governor of the preceding year.

*A resolution* for the payment of the State map.

*Resolutions* for the payment of a great variety of accounts.

*Several votes* authorizing new trials.

And, finally, elected all the officers, civil and military, of the State, who severally took their commissions, and acted under them during the whole of that year.

Minority re-  
port.

On the 4th of April, Mr. WRIGHT presented a document, which he desired might be received as a report by the minority of the committee. Upon the propriety of receiving it, and in what character it should be regarded, arose the following debate:

Debate on ac-  
cepting it.

Mr. WRIGHT said, when this report was offered the other day, he had been asked if it was responsive to the report of the majority of the committee; he had replied, that it contained the substantive views of the minority, and was responsive to the report of the majority. He had heard with great respect the suggestions then made as to the propriety of permitting the minority of a committee to make a report; he left this part of the question entirely in the hands of the Senate. In preparing this paper, he had acted under the belief that it would be acceptable to the Senate; he only asked now to be informed whether he had forfeited the assent formerly expressed with regard to this report, by the manner in which he performed his duty. It was not possible for him now so to change the document as to alter its character; he might avoid any allusion, in direct terms, to the report of the majority; he might hold the same arguments and maintain the same positions with regard to that report, without distinctly referring to it, but, in substance, the report of the minority would be the same as at present. The report of the majority was on the table before he undertook to prepare the paper now before the Senate; and he could not affect to believe that it was not there. He had acted in this matter in accordance with the practice of the other House, and with that of the Legislature of his own State. He could not consider the subject under the consideration of the committee, without referring to the report of the majority of that committee.

Mr. CLAY thought it fortunate that this matter came before the Senate in a form which would allow them to dispose of it free from the influence of any particular or party feeling. The circumstances of the case were these: A committee of five was organized to consider the subject of this election; by the resignation of one member, the committee was re-

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acceptance of  
the report of  
the minority.

duced to four; three of the four made a report, and the fourth, who very properly called himself a minority, proposed to make a counter report, which, whilst it contained the views of the minority, was also responsive to the views of the majority. Now, this was a question of mere form, and could be disposed of without reference to the great subject with which it was connected; because, as the minority consisted of only one individual, the views of that individual could be thrown before the people in the shape of a speech. It was important, however, that this matter should be decided, in order that some rule might be fixed for the future action of the Senate. This was the first case of the kind that had ever occurred. They took up the question, therefore, without precedent, and he hoped the Senate would consider it with reference to its principle. The object of appointing committees was the collection and condensation of facts, so that the Senate might have the facts and arguments connected with the various subjects they were called upon to consider brought before them in a compendious form.

If, instead of this, they were to have cases returned to them with all the contradictory, complicated, and adverse views of the different members of the committees, it would be better that these cases should never be referred at all. What would be the consequence of indulging in this practice? Why a committee of seven might be appointed, four of whom should agree on a report, whilst the minority of three, differing among themselves, might each insist upon presenting separate counter reports. Or they might have a majority of a minority insisting upon the presentation of a report in opposition to that of the original majority. A case of this kind, in which the individual members of the minority had presented reports, occurred in his own State. A clerk, who had acted improperly in his office, was under trial for his conduct; the members of the court differed in the manner above described, and the result was, that the individual, although acknowledged by all to be guilty upon some points, which merited expulsion, was acquitted. On principle, then, it was better to adhere to what had been the practice in this country until lately, and what was now, and ever had been, the practice in that country from which most of our institutions had been taken.

In England, the idea of permitting a minority to make a report had never once been entertained, and here the practice had arisen for the first time on the occasion of the Seminole war. A report of a majority was made upon that important subject, and the minority were also indulged with an expression of their sentiments. This circumstance was imitated in the other House, and by some of the State Legislatures; but all parliamentary practice was decidedly against it. It did seem to him that the present was a fair

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1st Session.

Debate on receiving a report by the minority of the committee.

occasion for gentlemen to concur in giving precedent which would settle this matter for the future.

With respect to what the members said about what occurred the other day, it was possible that the Senate would receive it, and the honorable gentleman had gone to the trouble of preparing the papers. He would have done well to have made a speech instead of a report. He had it already written out, and would thereby save himself the trouble of correcting the reports by the stenographers. If the report of the minority were to be received, it might be the means of recommitting the whole subject, and another majority might bring in another report. The safest way was to receive the report of the majority only.

Mr. KANE could not understand how gentlemen could travel over the same ground in parallel lines, and come to different results. If the arguments of the majority were to have weight, and the arguments of the minority were to have weight, they must both come to the same point. The distinction intended to be drawn was between the substantive reply of the committee and the opinion of the minority. The right of this distinction being preserved, was not procured by the production of the report in the form of a public speech. How did the record act? The record merely gave the report of the committee. It did not say whose opinion it was, and, therefore, did not establish the right of the minority to place their opinion upon record. But where was the inconvenience arising from this practice? Were there no practices bearing an analogy in co-ordinate branches of Government? A certain number of judges formed a quorum. The majority give their judgment, but the minority give theirs also. Suppose the majority take one view, and the minority another; the object of the appointment was to afford a convenient means to form a judgment from the several opinions. The Senate was entitled to the one as well as the other. It appeared to him that, in either point of view, the report should be read.

Mr. KING, of Alabama, would advise the gentleman to change his proposition. By so doing he would not change the fact in the slightest degree. The honorable Senator from Kentucky was desirous to avoid inconvenience. The question was a judicial one. Each party was acting under a certificate, signed by his Governor, that he was entitled to a seat. He understood the gentleman from New York (Mr. WRIGHT) to say, the honorable Senator from Virginia, (Mr. RIVES,) who was at that time a member of the committee, had agreed with him in the view which he had taken; so that it did not come under the denomination of a speech, but was the opinion of two members, who differed from the others.

When the subject was before the Senate on a former occasion, he wished to have the opinion of the minority. He

wished to do justice ; and, in order to enable him to do justice, he wished to be put in possession of all the information he could obtain. He believed that no legislative body should refuse to hear any thing that could throw light upon the subject under consideration. He wished to hear the paper read, and if there was any thing objectionable in it, let the gentleman take it back and strike it out.

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23d CONGRESS,  
1st Session.

Debate on receiving the minority report.

Mr. CLAYTON said the report had made a strong impression upon his mind, and, feeling that he was called upon to give his vote, he felt bound to hear that of the minority also. If the Senator from Kentucky was right, and if the question discussed was whether the Senate should receive the report, under the principle that it was a legislative body, he would be bound to say that the report would not be received.

Mr. C. then related a circumstance of a somewhat similar nature, which occurred in 1831, where a gentleman from South Carolina made a report on behalf of the majority of the committee, and a gentleman from New Jersey on the part of the minority. Both of these reports were received and printed. The consequence was, that the majority insisted upon a rejoinder, which was received and printed also. This was one of the evils which arose from the practice. If the gentleman would prepare his argument, he was willing to hear it. He would indulge the minority in an exhibition of their views, and he would be happy to have an opportunity of reading the views of the Senator ; but he understood that the accompanying documents were so voluminous as probably to occupy several hundred pages.

Mr. POINDEXTER said, when the subject was under consideration by the committee, a proposition was made to the other parties to hear their reasons, founded on the charter, and the proceedings and laws of the Legislature of Rhode Island ; but the honorable member who constitutes the minority, had referred to the whole argument of the report, and had quoted a number of passages. He had also introduced the documents on which they acted in deciding the question. Suppose the committee had employed a stenographer, and had taken down the speeches of the honorable gentleman from Rhode Island, would they have been considered as a part of the report ? The committee had drawn their own conclusions from documents, according to the views of their own minds, and the documents were not laid before the Senate : yet here they had references from A to K. It would be doubtless a waste of the public money to print these arguments ; they might as well receive a volume of speeches, and have it printed as the documentary proceedings of the Senate. He considered the report of the committee as resting, not on speeches, but on the documentary history of the country, especially of Rhode Island. He might receive aid from luminous arguments, but he would not embody parts of speeches in a report, as was now proposed. He was opposed

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1st Session.

Debate on re-  
ceiving a re-  
port by the mi-  
nority of the  
committee.

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23d CONGRESS,  
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Debate on receiving the minority report.

Mr. CLAYTON said the report had made a strong impression upon his mind, and, feeling that he was called upon to give his vote, he felt bound to hear that of the minority also. If the Senator from Kentucky was right, and if the question discussed was whether the Senate should receive the report, under the principle that it was a legislative body, he would be bound to say that the report would not be received.

Mr. C. then related a circumstance of a somewhat similar nature, which occurred in 1831, where a gentleman from South Carolina made a report on behalf of the majority of the committee, and a gentleman from New Jersey on the part of the minority. Both of these reports were received and printed. The consequence was, that the majority insisted upon a rejoinder, which was received and printed also. This was one of the evils which arose from the practice. If the gentleman would prepare his argument, he was willing to hear it. He would indulge the minority in an exhibition of their views, and he would be happy to have an opportunity of reading the views of the Senator ; but he understood that the accompanying documents were so voluminous as probably to occupy several hundred pages.

Mr. POINDEXTER said, when the subject was under consideration by the committee, a proposition was made to the other parties to hear their reasons, founded on the charter, and the proceedings and laws of the Legislature of Rhode Island ; but the honorable member who constitutes the minority, had referred to the whole argument of the report, and had quoted a number of passages. He had also introduced the documents on which they acted in deciding the question. Suppose the committee had employed a stenographer, and had taken down the speeches of the honorable gentleman from Rhode Island, would they have been considered as a part of the report ? The committee had drawn their own conclusions from documents, according to the views of their own minds, and the documents were not laid before the Senate : yet here they had references from A to K. It would be doubtless a waste of the public money to print these arguments ; they might as well receive a volume of speeches, and have it printed as the documentary proceedings of the Senate. He considered the report of the committee as resting, not on speeches, but on the documentary history of the country, especially of Rhode Island. He might receive aid from luminous arguments, but he would not embody parts of speeches in a report, as was now proposed. He was opposed



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to printing this paper *in extenso*, unless it should be printed without the speeches.

Mr. P. objected to making the proceedings of the committee controversial; if they were made so, the argument would be before the Senate instead of the committee. He had found all these minority reports, as they were called, to contain original views on facts and documents. He had not noticed any instance of taking up the report of the majority to show it was wrong. If the Senator might reply to the report, Mr. P. might do so to him, and he might again reply. If it were such a paper as the Senator from Delaware had described, he would receive it; but it was no such paper. The paper of Mr. Dickerson, on the petition from Philadelphia, had not the slightest reference to the majority report, except to say that it differed in its conclusion. If this paper had been such, he would have accepted it at once. He was willing that the gentleman should be indulged in presenting his own conclusions from facts, as the majority had done. He thought it would be a bad and dangerous precedent to receive this paper, though he would not object to its publication so far as he had already mentioned; it would be a precedent that would lead to incalculable mischiefs; even the minority of the minority might be at liberty to reply to the report of the majority. If it should be printed, he hoped the speeches would be excluded, for he could not conceive how they should constitute a part of the documentary history of the Senate.

Mr. SOUTHARD asked whether it was in order to receive this paper, according to parliamentary rules.

The CHAIR said the motion to receive was in order.

Mr. SOUTHARD's difficulty about it was, that the whole practice was not according to established rules. He had not been aware of the example alluded to by the Senator from New Jersey, at a former session; but he had remarked the operation of this thing in the other House. He recollected very well that the bank commissioners made majority and minority reports, and then a minority made a different report, so that they had three reports on the same subject, and by the same committee. To him this seemed a strange proceeding, and not in consistency at all with parliamentary rules or proceedings. It still appeared so; and in the present case, if the minority report should be received, they might receive as many papers as there were dissentient opinions. The conclusion was clear, that, on the principle laid down in the case of Mr. Dickerson, this paper ought to be rejected. It was no matter what it was called, paper or report; it was a paper intended to supply the place of a report, and it was a report, whatever the name. The practice would lead to confusion, and it was not needed; sufficient light would be obtained without admitting this species of report.

One of the necessary consequences attendant upon this practice would be, that the committee itself ought to be per-

mitted to answer the report of the minority. Suppose then a committee of seven were appointed, a majority of whom agreed upon a report, whilst the minority differed among themselves—each member of the minority entertaining peculiar and separate views; well, if these members of the minority were permitted to make reports, the majority of the committee must, or at least ought, in common justice, to be permitted to make a reply. It was better, therefore, to adhere to parliamentary rule, and to decide that these papers could not be received. If he thought there would be any shutting out of light by the course he recommended—if he thought the public would be prevented from getting at all the facts of the case—he would go as far as possible the other way. He (Mr. S.) and those who thought with him upon this subject, could have no other interest on this occasion than a desire to prevent confusion.

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Debate continued.

Mr. FORSYTH said he was afraid the attempt to prevent confusion would create it. He did not see any difficulty in the reception by the Senate of reports of this kind. Supposing the Senate should refuse to receive them, what was to prevent the parties from having them printed in the journal? They had only to propose the reports as resolutions. The fact of the question turned upon whether these reports should be printed in the usual form, or in the journal of the Senate. The object desired was that the minority should present their views in such a form as would enable any member to peruse and consider them in his own chamber. He would make a motion for the purpose of effecting this object; he would move that the report be laid on the table, and printed for the use of the members.

Mr. POINDEXTER was opposed to the printing, because at least half a dozen speeches were referred to in the report. The document itself was a perfect novelty. He defied any person to prove that any paper had ever been received in reply to the expressed views of the majority of a committee. He should be happy to have the views of the Senator from New York upon the papers which had been before the committee, but if the report which had been presented by the honorable Senator was received, he (Mr. P.) would move that the majority be permitted to reply to it.

Mr. CLAY approved of the motion of the Senator from Georgia; if that motion were agreed to, the object of the minority would be attained, and no precedent would be established in favor of the reception of these papers in future.

Mr. WRIGHT asked that the report might be read, thinking it would prove the best reply to some observations which had been made during the morning.

Mr. FORSYTH said his object in moving to print was to avoid the reading of the memorial.

Mr. BENTON thought the Senate ought to go as far in this case as precedents would carry them. Now there were seven

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ral instances in which papers of this kind had been received. After that, followed the report of Mr. Adams, which formed a considerable volume ; and then followed other documents. Mr. Adams gave documents in his report to the amount of fifty-two in number. To exemplify the facts, Mr. B. referred to Document No. 13, which contained twenty-four recitations of evidence, and to others which contained various numbers ; and the quantity of documental matter which was printed with a report of a minority, contained infinitely more matter than the original report. He need not go further than the inconvenience which would arise from the system.

Mr. CLAYTON observed that if the Senate were to have reports of minorities, or papers in lieu of them, he did not see the necessity for printing the documents along with them. They might be referred to in the Secretary's office.

Mr. WRIGHT said the course adopted by the committee to arrive at the facts, was to call on the parties for facts, to avoid the necessity of sending to Rhode Island for masses of facts. He here entered into a description of part of the evidence in his report.

Mr. SPRAGUE said that if the views of the Hon. Senator from New York (Mr. WRIGHT) were printed, and incorporated with the documents of the Senate, the case would be substantially the same as if they were received by the Senate. He thought, the other day, that the precedent established went so far as the Senate ought to receive the views of the minority. But the gentleman from New York wished to present answers distinctly to the argument of the majority, as he was unwilling to change the form. Now, having the report before him, he replied to it, and gave opinions, perhaps, only held by the chairman of the committee, who usually made out the report, taking the leading opinions of the majority, and of course supplying his own. If each member of a committee were to write a report, every report would be different. Then, if the principle were established that each part of a committee report, each member of a committee ought to have a right to say that his views did not bear that illustration, and to present another report. He wished, if the report were received and printed, to give the majority an opportunity of response.

*Ordered* to be laid on the table.

The question being on printing,

Mr. POINDEXTER said the gentlemen on the committee made statements and counter statements, both of which might be found on the statute books of Rhode Island, and the Senate might as well print the statute book of Rhode Island. He would have no objection against printing the paper, upon an understanding that the speeches were to be left out. The question was, whether the persons sending Mr. Robbins were the Legislature of Rhode Island. If not, they had no right to elect. The statement was intended to decide who had a right to a seat, and who had not.

Mr. CLAYTON objected against printing all the accompanying documents.

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Mr. WRIGHT said, if the Senator from Georgia was willing, he would modify his motion so as to exclude the printing of the three largest papers, G, H, and I.

The paper was then ordered to be printed, and is as follows:

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*Report of the Minority of the Committee.*

The course adopted by the committee to settle the facts upon which their opinions were to be formed, was to call upon the parties to the controversy for statements of the facts which they wished to prove, or which each wished admitted by his opponent, as being, in their estimation, material to their respective claims. This call was answered by Mr. Potter by the statement signed by him, and dated 11th December last, which is hereto annexed, marked D. Mr. Robbins replied to this statement of Mr. Potter by the paper hereto annexed, marked E. This reply of Mr. Robbins was submitted to Mr. Potter, and drew from him the additional statement signed by him, and dated 31st December last, which is hereto annexed, marked F. Here the statements of facts closed, and Mr. Potter was called upon for such arguments as he might choose to submit to the committee, when he returned the paper annexed, signed by him, dated 21st January last, and hereto annexed, marked G. To this argument Mr. Robbins replied by the paper signed by him, dated 24th January last, and hereto annexed, marked H. Mr. Potter rejoined by the paper signed by him, dated 3d February last, and hereto annexed, marked I. In this state, the case was submitted to the committee, each party having accompanied their statements with such proofs from the journals of the Legislature of their State, and other public records, as they considered required. Most of the points established by the proofs submitted, are fully admitted and agreed upon by the parties in their statements of facts, and, therefore, such of them only will be referred to and annexed as may be found material to establish facts not so admitted. The statements and arguments of the parties are annexed, because the undersigned considers the question one of the highest importance; and that it is proper the Senate should see fully the facts which the immediate parties to the controversy have considered in any way material, the arguments by which they have sought to direct the judgments of the members of the committee, and the conclusions they have formed upon the points raised.

The majority of the committee, in the view they have taken of the subject, have not considered it important to print these statements, or but a very small portion of the

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proofs submitted ; but as the course of reflection pursued by the undersigned, and the opinion he has formed, have been governed by the facts disclosed in these papers, and as the parties have so intermixed fact and argument in all their statements, that the one cannot well be separated from the other, he feels that he may be borne out in his facts without annexing to this report these statements entire, while he is sensible that the arguments he shall offer will be mostly repetitions of those which the parties have presented to him. That both of the parties have assumed positions which are untenable, as well as positions which are wholly irrelevant, is clear to his mind, as he does not doubt it will be to the judgment of the Senate ; but he still thinks they have not omitted the true and material points of the controversy, and that their suggestions may do that justice to the subject which it will not receive from any effort of his. The undersigned believes that, as to most of the facts assumed by the majority of the committee, there will be no dispute ; but as there are facts in the case which he considers material, and to which the majority of the committee do not refer in their report, a reference to the statements of the parties, and to some of the proofs, will be necessary to authorize him to use those facts to sustain his conclusions. And if, under this impression, he should connect with this report any portion of the documents before the committee, which, upon examination, may not appear to have been necessarily so connected, he feels sure that the Senate will find his excuse in the conviction he is under, that the novelty and importance of the question demand a full exhibition of the facts and arguments which are material and relevant, and that the safe course is to withhold nothing which may be important, though that course may lead to the examination of much which is unimportant.

Having reference to these statements, and to such other documents as shall be hereafter referred to, the undersigned makes the following relation of facts upon which he supposes the decision of the question submitted to the committee must mainly rest.

Charles II, King of England, in the year 1663, granted to his colony in America, known as the colony of Rhode Island and Providence Plantations, (now the State of Rhode Island,) a charter for its civil government ; which was submitted to the people of the colony, and adopted by them, and thus became the fundamental law of the colonial Government. [*See the paper annexed, duly certified, and marked K.*]

The said charter proved, among other things, that, “for the better ordering and managing of the affairs and business of the said company, and their successors, there shall be one Governor, one Deputy Governor, and ten assistants, to be, from time to time, constituted, elected, and chosen, out of the freemen of the said company for the time being, in such

manner and form as is hereafter in these presents expressed.”  
 [See the Charter, page 6, of the Laws of Rhode Island, Digest of 1822.]

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The charter appointed the first Governor, Deputy Governor, and assistants, “to continue in the said several offices, respectively, until the first Wednesday which shall be in the month of May now next coming.” [See same page as above.]

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The charter further provided, “that forever hereafter, twice in every year, that is to say, on every first Wednesday in the month of May, and on every last Wednesday in October, or oftener in case it shall be requisite, the assistants and such of the freemen of the said company, not exceeding six persons for Newport, four persons for each of the respective towns of Providence, Portsmouth, and Warwick, and two persons for each other place, town, or city, who shall be from time to time thereunto elected or deputed by the major part of the freemen of the respective towns or places for which they shall be so elected or deputed, shall have a general meeting or assembly, then and there to consult, advise, and determine, in and about the affairs and business of the said company and plantations.” [See Charter, page 7, Digest of 1822.]

The charter further provided, “that the Governor, or, in his absence, or by his permission, the Deputy Governor of the said company for the time being, the assistants, and such of the freemen of the said company as shall be so as aforesaid elected or deputed, or so many of them as shall be present at such meeting or assembly as aforesaid, shall be called the General Assembly; and that they, or the greatest part of them then present, whereof the Governor or Deputy Governor, and six of the assistants, at least to be seven, shall have, and have hereby, given and granted unto them full power and authority, &c. :” thus constituting the legislative body for the colony. [See Charter, same page as last above.]

The charter further provided for the election, time of election, and term of office of the Governor, Deputy Governor, and assistants, in the following words, to wit: “And, further, our will and pleasure is, and we do hereby, for us, our heirs, and successors, establish and ordain, that yearly, once in the year, forever hereafter, namely, the aforesaid Wednesday in May, and at the town of Newport, or elsewhere, if urgent occasion do require, the Governor, Deputy Governor, and assistants of the said company, and other officers of the said company, or such of them as the General Assembly shall think fit, shall be, in the said General Court or Assembly to be held from that day and time, newly chosen for the year ensuing by such greater part of the said company for the time being, as shall be then and there present.” [See Charter, page 9, Digest of 1822.]

No charter was granted to this colony by the Crown of Great Britain subsequent to that of Charles II above mentioned, and previous to the American revolution, but the



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colony remained subject to the provisions of that charter so long as it remained a British colony: and the people of the State of Rhode Island, since the revolution, have formed no constitution of government, but have continued the system of government existing with them at the time of that event, having only changed their allegiance.

From the time of the adoption of the charter in 1663-'4, by the people of the colony, up to the year 1831, no change had taken place in the qualifications for the offices of Governor, Deputy Governor, or assistants, or in the terms of their respective offices, but all those officers were elected annually during all that period. The official name of the Deputy Governor had been changed in the laws to that of Lieutenant Governor, the official name of assistants to that of Senators, and the official name of the deputies to that of Representatives; but these changes of official names or designations were not accompanied by any changes of official powers or duties.

The charter contemplated that all the freemen should assemble at Newport, "or elsewhere, if urgent occasion do require," and should vote at the same poll for their Governor, Lieutenant Governor, and Senators. This mode of voting was partially changed soon after the granting of the charter, and a privilege was given to each freeman to attend at Newport and vote in person, or to send his vote by a proxy. The increase of population in the colony, and its diffusion over a large extent of territory, in the course of time induced the Legislature to extend this system of voting by proxy, and to provide for the holding of a poll in each town on the day of an annual election, giving to the freemen of the towns the right to prepare a written or printed ballot containing the names of the persons for whom each should choose to vote for Governor, Lieutenant Governor, and Senators, and all such other general officers as were to be voted for, or as the voter should choose to vote for, with proper designations as to the office designed for each person voted for; which ballot so prepared, with the full name of the voter written upon the back thereof, he was at liberty to deposite in the ballot box of his town. Accurate poll lists of the persons voting were to be kept, and after the close of the poll, the ballots so deposited in the box, and the endorsement of the name of the voter on the back thereof, were to be compared with the poll list, and, when found to agree, the original poll list was to be deposited with the town clerk of the town for the inspection of the freemen thereof; and a copy of the same poll list, together with the ballots so taken, carefully sealed up by the persons having charge of the poll, was to be delivered to the member of the House of Representatives elected for the town, or to a Senator, to be by him taken to Newport, and there delivered in the General Assembly on the day fixed by the charter for the election at Newport of the Governor, Lieutenant Governor, and Sena-

tors, and other general officers. On that day the House of Representatives newly elected for the half year then next following, take the oath of office, and then proceed to open and count these votes so sent to them for the choice of a Governor, Lieutenant Governor, and Senators, and such other general officers as are to be elected, to compare the votes with the poll lists also sent, and to pronounce the result; and the Governor, Lieutenant Governor, and Senators elected, if any such officers are elected by a majority of all the votes thus given, the result being pronounced, take the oath of office, and the Legislature is organized. This system of voting was substantially adopted by the colony as early as the year 1760, and has ever since been, and still is, the manner in which the freemen of Rhode Island vote for their Governor, Lieutenant Governor, Senators, and other general officers. [*See the statements of the parties annexed, and particularly the act of August, 1760, marked L.*]

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The charter seems also to have contemplated that the whole Legislature should have formed one body or aggregate mass; but, soon after the granting of the charter, the practice was adopted of forming one House of the Governor, Lieutenant Governor, and assistants, or Senators, called the Senate, and another House of the Representatives elected by the towns, called the House of Representatives, and, for the purposes of legislation, of having the two Houses set apart and act separately, each exercising equal legislative powers, and, of consequence, each having a negative upon the action of the other. This practice is still continued in the organization of the Legislature of Rhode Island for legislative purposes, though, when acting executively, or acting in the election of a Senator to represent the State in the Senate of the United States, the two Houses still act together as one body, and in that State, are termed, by the laws and practice of the Government, "The Grand Committee." [*See Laws of the State and Journals of the Legislature.*]

The time fixed by the charter for the annual elections of Governor, Lieutenant Governor, and Senators, is the first Wednesday in May; and to give time for the freemen to hold the polls in their respective towns, and to have their proxies delivered at Newport by the day required, the law prescribes the third Wednesday in April, in each year, for holding the town meetings, and for receiving and sealing up the proxies in the manner before related. [*See page 94 of the Digest of 1822.*]

Pursuant to these regulations an annual election for Governor, Lieutenant Governor, and Senators, was held in the State of Rhode Island on the third Wednesday of April, 1831; and, upon counting the proxies returned to Newport on the first Wednesday in May thereafter, the day fixed by the charter, there appeared to have been a Governor, Lieutenant Governor, and eight of the ten Senators, duly elected. These,

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constituting more than a quorum of the Senate, were duly sworn, and, together with the House of Representatives, composed the Legislature of the State: but no attempt was made to fill the two vacancies in the Senate.

No question has been made before the committee, or is understood to exist, as to the proper organization of this Legislature, or as to its powers as the Legislature of the State—the Senate for one year from the first Wednesday in May, 1831, and the House of Representatives from the same first Wednesday in May until the last Wednesday in October of the same year.

A new House of Representatives was duly elected, and qualified on the last Wednesday in October, 1831, which, together with the Senate before mentioned, again constituted a regularly organized Legislature of the State, with all the powers possessed by any Legislature of Rhode Island.

This Legislature, in January, 1832, being regularly convened for the transaction of business, passed an act providing, among other things, that, in case of a failure, at any annual election by the people, of the election of a Governor, Lieutenant Governor, or a quorum of the Senate, such of those officers as had been elected previously, and who should then be the incumbents of the offices, and in whose places no others should be elected, should continue in the respective offices, and possess the powers, and discharge the duties thereof, until others should be elected and duly qualified to take their places. [*See a copy of this act annexed, marked M.*]

The annual election, pursuant to the law, for the election of a Governor, Lieutenant Governor, and Senators, was again held in the towns on the third Wednesday in April, 1832, and the proxies of the freemen of the State taken and sealed up in the usual form; and, on the first Wednesday in May thereafter, those proxies were opened and counted at Newport; when it was found that no election of Governor, Lieutenant Governor, or any Senator had been made, no person having received the majority of all the votes given for any one of those offices. [*See the statements of the parties annexed.*]

The Governor, Lieutenant Governor, and eight Senators, elected in 1831, and whose official terms, according to all previous practice of the Government, expired on that day, continued to act as the Governor, Lieutenant Governor, and Senators of the State, until the first Wednesday in May, 1833, just two years from the time of their last election and qualification for their respective offices, there having been, in the mean time, between the first Wednesday in May, 1832, and the first Wednesday in May, 1833, five several elections for the choice of persons to fill these offices; the first four of which were special, and held in obedience to a provision contained in the act of January, 1832, before refer-

red to, and hereto annexed, and were all unsuccessful; and the fifth was the regular annual election for 1839, held on the third Wednesday in April in that year, in obedience to the general election law of the State, when an election was made of a Governor, Lieutenant Governor, and eight Senators, who took the oaths of office, and entered upon the duties on the first Wednesday in May, 1833. [*See the statements of the parties annexed.*]

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During the whole of this period, from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, the House of Representatives of the Legislature of the State of Rhode Island was in regular organization, and composed of members regularly elected at the ordinary times, and in the ordinary manner of electing members to that branch of the Legislature of the State, according to the established laws. [*See the statements of the parties annexed.*]

On the first Wednesday in May, 1832, the honorable Asher Robbins was a Senator in the Congress of the United States from the State of Rhode Island, and his official term was to expire on the third day of March, 1833; and, by a law of the State, its Senators in the Congress of the United States are to "be appointed at the session of the General Assembly next preceding the expiration of the term of service of the Senator for the time being, and not before." [*See Digest of 1822, page 107, sec. 6.*]

In January, 1833, the body claiming to be the Senate of the State of Rhode Island, and acting as such, consisting of the Governor, Lieutenant Governor, and eight Senators, elected on the third Wednesday in April, 1831, and who took their oaths of office, and entered upon their official duties, on the first Wednesday of May, 1831; and the House of Representatives of the State, regularly elected and qualified, being assembled, and acting as the Legislature of the State, met in grand committee, and voted for a Senator to represent the State of Rhode Island in the Senate of the Congress of the United States for the term of six years from the fourth day of March then next following, when the term of Mr. Robbins would have expired. Upon counting the votes so given by the persons assuming to be the Governor, Lieutenant Governor, and Senators of the State, and by the members of the House of Representatives of the State present and voting, it was found that Asher Robbins had received a majority of the whole number of votes given: whereupon, he was declared to be elected. [*See the statements of the parties annexed.*]

Pursuant to this proceeding, the person then assuming to be the Governor of the State of Rhode Island, and acting as such, did, on the 28th day of January then instant, under his hand and the seal of the State, execute, and deliver to Mr. Robbins a commission in the ordinary form, according to the laws and practice of the Government of the State, for the

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office of Senator to represent the State in the Senate of the United States for the term of six years, to commence on the fourth day of March thereafter.

The validity of this election of Mr. Robbins to this office is contested upon the ground that the persons acting as the Governor, Lieutenant Governor, and Senators of the State, and, as such, voting for a Senator at the time Mr. Robbins's election was made; were elected on the first Wednesday in May, 1831, "for the year ensuing," and for no longer term; that, upon counting the proxies, and pronouncing the result of the election for Governor, Lieutenant Governor, and Senators, on the first Wednesday in May, 1832, these officers became *functus officii*, so far as related to their election in 1831, whatever that result might be; and that the Legislature of the State had not the power to continue their official terms, or official existence, beyond the limits fixed in the charter, of "the year ensuing" their election by the people; and the act of January, 1832, so far as it attempts to perpetuate these officers, without a re-election by the freemen of the State, is pronounced to be contrary to the provisions of the charter, and therefore void.

Upon the other side, it is contended, 1st, that, by the charter itself, the offices, powers, and duties of these officers do not cease and determine until others are elected in their places; and, 2d, that the Legislature of Rhode Island have, with the acquiescence of the people of that State, passed many laws in contravention of the charter; that the practice of the Government, as shown by its legislation, proves that the charter has not been held to be the fundamental law of the State, except as to certain specific grants; and that the act of January, 1832, does not conflict with those grants, and is therefore a valid act in all its parts.

In view of this part of the controversy, the discussion of the following questions appears to be called for:

*First.* Is the charter before mentioned, granted by Charles II of England to the colony of Rhode Island and the Providence Plantations, to be now considered to any, and, if to any, to what extent, as the constitution of government of the State of Rhode Island, and as a constitution binding upon the Legislature of that State?

*Second.* Does that charter fix and prescribe the term of office of the Governor, Lieutenant Governor, and Senators of that State?

*Third.* Can the Legislature of that State, consistently with the powers granted to that body by the charter, extend the official terms of those officers beyond the limit fixed by the charter?

*Fourth.* Can the Senate of the United States, when these questions are presented to it by the action of the Legislature of the State of Rhode Island, in the purported election of a member for this body, look into, and pronounce its opinion



upon them, by way of inquiry into the right of a sitting member to the seat he occupies?

That the charter of 1663 is, to some extent, to be considered as the fundamental law of the State of Rhode Island, and, as such, binding upon, and restrictive of, the legislative power of that State, is admitted by all, and has not been made a question before the committee. The extent to which it is to be so considered, is a point upon which not only the parties before the committee, but the members of the committee themselves, disagree. This point, therefore, must be settled by such references to the history of the legislation and practices of the Government and people of the State, as have been laid before the committee, and by the inferences which that history shall be found to justify. The undersigned will, in the first instance, offer to the Senate some of the evidences which have operated most strongly on his mind to show the tenacity with which the people, the Government, and the Legislature of that State, have adhered to the charter in its inconvenient and unjust requirements, going most clearly, in his judgment, to show the strong binding force which has been allowed to it up to this very day; and, having done this, he will review, as concisely as the importance of the subject will allow, the instances cited by the majority of the committee to show that the Legislature have not regarded the charter as binding upon, or restrictive of, their powers when the public interests or the public convenience conflicted with its provisions.

*First.* The charter fixes the standard of representation for the towns of the State in the popular branch of the Legislature, by giving to the town of Newport six representatives; to the towns of Providence, Portsmouth, and Warwick, four representatives each; and to each other "place, town, or city" in the State, two representatives, wholly without regard to population, property, or any other basis upon which representation is usually settled. By the census taken in 1830, in obedience to an act of Congress, the town of Newport, with six representatives, had a population of 8,010 souls; while the town of Providence, with four representatives, had a population of 16,833 souls; thus showing Providence with more than double the population of Newport, and with but two-thirds of its representation in the popular branch of the Legislature. The town of Portsmouth has a population of 1,127 souls, a little more than one-sixteenth of the population of Providence, and a representation exactly equal to it. The town of Smithfield has a population of 6,857 souls, and two representatives, and the town of Jamestown has a population of 415 souls, and two representatives—equal to the representation of Smithfield. The whole county of Newport has a population of 16,535 souls, and twenty representatives, while the single town of Providence, with but four representatives, has a population of 16,833 souls. These

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are some of the instances of the greatest disparity ; but the statement annexed, marked N, will show the names and population and representation of all the towns in the State, and, in a condensed form, the population and representation of each county in the State. Still the Legislature of Rhode Island have never attempted to equalize the representation of the State, because the charter has been held to be the fundamental law upon the subject, and to restrain its powers in this particular.

*Second.* Elections of members to the popular branch of the Legislature of the State have continued to be made semi-annually, because such was the requirement of the charter ; and to comply with this provision of that instrument, and with the custom of the Government under it, the Legislature is regularly convened four times in each year. Still no attempt has been made by the Legislature, though the State is small, and the business of legislation for it not extensive, to alter the forms of the government in this respect. The charter has been held to be paramount to its authority, and to control its action, and the action of the people of the State, in this particular.

*Third.* A majority of all the votes given at any election by the people has been held to be required to elect any officer of the State Government, because the charter requires such majority to constitute an election ; and, notwithstanding that the present controversy has grown wholly out of that requirement, the Legislature of the State has never assumed that it had the power to dispense with the rule, and to authorize the election of those officers by a less number of votes than a majority of all the votes given for the office to be filled. Here again the charter has been, and still is, to be held fundamental law.

*Fourth.* From the granting of the charter in 1663, to the present time, with the single exception now in dispute, the Governor, Lieutenant Governor, and Senators of the State, have been elected annually, and have entered upon the duties of their respective offices on the first Wednesday in May in each year, the time prescribed by the charter ; have held their offices and discharged the duties thereof for one year, and no longer, without a re-election. In repeated instances, vacancies have existed in the Senate in consequence of a failure to elect, by a majority of all the votes given, persons to fill all the places in that body ; and those places have, without an exception, until the first Wednesday in May, 1832, remained vacant for the year, nor was the idea ever suggested that the incumbents of the former year could continue to hold them, or that they could be otherwise filled than by an election by the freemen of the State. Until the act of January, 1832, the charter had ever been considered the fundamental law of the State upon this subject, and paramount to any authority existing in the Legislature.

*Fifth.* The mode of conducting elections of the general officers of the State, and the plan of voting by proxy, before detailed, is considered by the undersigned as an evidence of the strongest character to prove the rigidity with which the people and the Legislature of Rhode Island have adhered to the charter to the utmost extent of the spirit of even its minute provisions. The charter was granted when the colony was small, and the extent of territory inhabited was very limited. Indeed, it is fair to presume that Newport, Providence, Portsmouth, and Warwick, were all the towns then containing a population of freemen, as those are the only towns named in the distribution of the representation of the colony. The population of the colony, too, must have been very small, and therefore the charter was framed under the contemplation that the annual elections could be conveniently held at one point, and that all the freemen could conveniently assemble and vote at the same poll. The practice of a very few years exhibited the inconvenience of this arrangement, and a law was passed presenting to the choice of every voter the alternative of attending the poll at Newport in person, or of sending his written vote in the form and manner prescribed by the law. This mode of voting was continued without material alteration for nearly a century, and until the year 1760. Then the system was introduced of holding a poll in each town, and of requiring the freemen to deposit their proxies there for the general officers, that being, for all purposes material to this argument, the same system which now prevails, and which has prevailed from the year 1760 to the present time. It is true that the votes are deposited in a ballot box in each town, but it is also true that every vote is endorsed by the full name of the freeman who gives it, written upon the back of the ballot; that all the ballots, together with accurate poll lists of the persons voting, are carefully sealed up at the closing of these polls; that they are in that state put into the hands of a member of the Legislature, whose duty it is to deliver them, unopened, in the General Assembly at Newport, at the time and place when and where, by the charter, the election of the officers voted for is required to be made; that the votes are there opened and counted, and the result ascertained and pronounced in all respects in strict conformity with the requirements of the charter, except that each freeman, instead of attending in person, has sent his written ballot endorsed with his full name, and expressing his free choice. This, in the common parlance of the people of the State, is the election; and the undersigned cannot but consider it a rigid regard to, and strict fulfilment of, the provisions of the charter in their spirit and beneficial meaning, furnishing the highest evidence of the great extent to which the people and the Legislature of that State have observed that instrument as their fundamental law and constitution of government.

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*Sixth.* At the January session of the Legislature of Rhode Island, in the year 1824, a law was passed to provide for calling a convention to form a constitution of government for the State. The members of the convention were chosen at the annual election on the third Wednesday of April in that year, and assembled at Newport in June following, and entered upon the discharge of the duties assigned to them. They formed a constitution, which was submitted to the people of the State for their adoption or rejection, at town meetings holden on the second Monday of October, 1824. The constitution so formed differed widely, in many respects, from the provisions of the charter, and it was rejected by the people of the State by a vote of only 1,668 for, to 3,206 against it; thus commanding the approbation of but a trifle more than one-third of the persons voting. It is, from the nature of the case, impossible to say upon what particular grounds this strong rejection was made; but it cannot be improper to remark that the constitution so rejected contained, among other provisions varying from those of the charter, the following:

*"The supreme executive power of this State shall be vested in a Governor, who shall be chosen by the electors properly qualified, and shall hold his office for the term of one year from the first Tuesday in May next succeeding his election, and until his successor be duly qualified. But if no person shall have a majority of votes, the Senate and House of Representatives, in joint committee, shall choose a Governor, by ballot, from the two persons having the highest number of votes."*

Here is a departure from the provisions of the charter, in two important particulars: 1st, that the Governor in office shall continue to hold "until his successor be duly qualified;" and, 2d, that, in case of a failure by the people to elect by a majority of all the votes given, the Legislature might fill the vacancy. It is freely conceded that the extent to which this provision influenced the decision of the people can never be known, and must ever remain mere matter of opinion; but it is believed that the decisive rejection of this constitution may be properly assumed as a strong evidence of their unyielding attachment to the charter, with all its imperfections; and that it would be doing great violence and injustice to the patriotism and intelligence of the people of Rhode Island to suppose that this action on their part took place, while they believed that they were without a written constitution of government, and wholly dependent for their fundamental law upon the will and pleasure of their legislative Assemblies.

*Seventh.* The result of the election in the State of Rhode Island, in 1833, after one year of experience under the act of January, 1832; the repeal of that law by the new Legislature as one of its first acts; the election again of a new

House of Representatives in August, 1833; the passage of the act declaring Mr. Robbins's appointment void, in October, 1833, and the appointment of Mr. Potter to represent the State in the Senate of the United States, are considered strong evidences that the act of January, 1832, was held by the people of the State to be a violation of the charter, a usurpation of power on the part of the Legislature which passed it, and calculated to retain in office men whom they had not elected, and did not approve.

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Such are the evidences offered to show that the charter has been, and is considered by the Legislature, the Government, and the people of Rhode Island, as their fundamental law and constitution of government, to some extent not only, but to the full extent of all its material provisions, except so far as those provisions have been rendered obsolete by the American revolution, and the consequent change of that people from the condition of colonists to that of citizens of a free State.

The majority of the committee entertain a different view upon this subject from that here expressed, and the importance of the question, as well as a proper respect for the opinions of his colleagues upon the committee who differ with him, makes it the duty of the undersigned to notice the grounds upon which they rest the conclusion to which they have come. The majority of the committee seem to consider that the power conferred by the charter upon the Legislature of the colony, "from time to time to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments hereinafter mentioned to be granted, and of the people that do, or at any time hereafter shall, inhabit or be within the same, so as such laws, ordinances, and constitutions, so made, be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there," grants a power to that body to make laws at variance from, and in contravention of, the provisions of the charter, if such laws "to them shall seem meet for the good and welfare of the said company." This power, they say, "has been exercised from time to time before and since the revolution, when Rhode Island became one of the States of the Union. These modifications have materially changed the provisions of the charter, and established fundamental principles of government inconsistent with those recognised and ordained by the charter, which now remains only the nominal foundation of the legislation of the State."

The undersigned is unable to assent to the construction which the majority of the committee seem thus to have put

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upon the clause of the charter above given. He supposes it to be an invariable rule for the construction of every deed or other instrument, and of every law or ordinance, that each part shall be so construed as to make it, to the greatest possible extent, harmonize with, and not be destructive of, any other part or portion of the same deed, instrument, law, or ordinance. The charter of Charles II to the colony of Rhode Island was designed as a system of civil government for the colony; it was a grant from the sovereign to a portion of his subjects for that purpose; it constituted certain offices, and prescribed the powers and the duties in a general manner, which should pertain to them. These offices, it will be seen by an examination of the charter, were to constitute the Legislature of the colony, and the officers who should fill them were to be the legislators of the colony. To this Legislature very broad powers are granted by the charter, and the clause now under consideration is one among the clauses enumerating those powers. Other clauses give other powers, such as to elect and constitute "offices and officers," to grant commissions, "to appoint, order, and direct, erect and settle such places and courts of jurisdiction for the hearing and determining of all actions, cases, matters, and things, happening within the said colony and plantation, and which shall be in dispute and depending there;" "to distinguish and set forth the several names and titles, duties, powers, and limits, of each court, office, and officer, superior and inferior;" to contrive and appoint forms of oaths and attestations; "to regulate and order the way and manner of all elections to offices and places of trust;" to limit and distinguish the numbers and bounds of all places, towns, and cities, which may have "the power of electing and sending of freemen to the General Assembly;" to direct and authorize the imposing of fines, mulcts, imprisonments, and executing other punishments, pecuniary and corporeal; "to alter, revoke, annul, or pardon, under their common seal, or otherwise, such fines, mulcts, imprisonments, sentences, judgments, and condemnations," with many other powers. Now, it is respectfully suggested and urged that the power "to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances, forms and ceremonies of government and magistracy, as to them shall seem meet," granted to the Legislature of the colony by the clause of the charter under consideration, should be understood as applicable to the powers and duties above enumerated, and to all the other powers and duties granted and assigned by the charter to the Legislature, and not as conferring powers above and beyond the charter which makes the grant. This construction will make the clause in question act in aid of the charter and of the objects designed to be accomplished by it, while the other construction will make all the remaining portions of the charter entirely contingent, and wholly dependent upon what shall



“seem meet” to the Legislature. It will also present the singular anomaly of a legislative body standing upon the charter as a constitution of government from which it derives its existence, its constitution, its organization and being as a legislative body, and claiming a power, granted in that charter itself, to subvert the whole instrument. Such a construction will not surely be given to this instrument when a different and at least equally natural one presents itself, which will not make the instrument a *felo de se*, but will make each part harmonize with the whole, and further the purposes which the whole was intended to accomplish.

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But the undersigned respectfully suggests his belief that the majority of the committee are mistaken in the extent to which they seem to suppose the acts of the Legislature of Rhode Island have conflicted with the provisions of the charter. And that he may make his views upon this point intelligible to the Senate, he will notice, as briefly as he is able, the instances, in their order, wherein the majority think the infractions upon the charter consist.

*The first* is the permission granted by the Legislature of the colony to the freemen of the colony as early as 1664, one year after the granting of the charter, to send to Newport a sealed ballot, expressing the choice of each freeman sending it, for the general officers of the colony, instead of compelling each freeman to attend at Newport in person to express that choice; the ballot so sent being required to be sealed up, and to have the full name of the voter written upon its back, to make it a legal ballot. As the undersigned has already expressed his conviction that this law was not a violation of the charter, but a full compliance with it in its spirit and meaning, no further remarks will be required here, the same point being again raised under the third enumeration, by the majority of the committee, of the infringements by the Legislature upon the provisions of the charter.

*The second* is the separation of the legislative body of the colony into two Houses, each exercising equal legislative powers, and each possessing a negative upon the other when acting legislatively. This separation took place in the year 1666, about three years after the granting of the charter. It was undoubtedly the contemplation of the charter, as the undersigned construes its language, that the Governor, Lieutenant Governor, assistants, and deputies, should sit together in one body, but it is not seen that the separation, by which the Governor, Lieutenant Governor, and assistants should form one body, (now the Senate,) and the deputies should form another body, (now the House of Representatives,) necessarily constituted any violation of the charter in its spirit and meaning. The members were all to be elected by the people, and at the periods required by the charter, notwithstanding the separation. The same persons were to constitute the Legislature of the colony, whether acting together



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as one body, or separately as two branches of the same Legislature. The only effect, therefore, of the separation would be to restrict the legislative power by giving the body, small in numbers, a negative in all cases as to legislative acts, upon the more numerous body or House. This could not form a subject of complaint on the part of the Crown, which was one party to the charter, because the effect was to limit the exercise of that portion of sovereignty which had been granted to the colony, and not to extend it. It might have formed the subject of complaint to the people, in case it had operated as such an embarrassment upon the legislative power as to injure the public interests; but when we find that the measure was taken upon the suggestion of two of the most populous towns of the colony, and predicated upon the inconveniences of a single Assembly for legislative purposes; that it was adopted after three years only of practice under the contemplation of the charter of a single House; and that it has, from that time to the present, received the acquiescence and approbation of the people, the undersigned respectfully submits that this change may be well considered one of those "forms and ceremonies of government and magistracy" which, to the Legislature, might well "seem meet," and which that body might well consider within its powers under the charter "for the good and welfare of the said company," and not as the exercise of a power either above or beyond the specific grants made by the charter.

*The third* is the law of 1760, requiring polls to be held in the different towns, and all the freemen to vote by proxy, and to deposit their proxies, endorsed in writing with their full proper names, in the ballot boxes at those polls. This law, in all material particulars, established the system of voting which prevails to this day in the State of Rhode Island; and the question is, does this system constitute a violation of the charter of such a character as to authorize the assumption that the people of that State have ceased to consider it the fundamental law of their State Government? The undersigned is compelled to say that he does not so consider it; and his reasons for this conclusion are:

1st. That the violation complained of relates solely to a privilege granted to the freemen of the colony by the charter, the exercise of which, either in person or by proxy, must concern them alone, and could not afford to the Crown any cause of complaint, whatever might have been the mode of its exercise, so long as that mode only proposed to effect an election, by the choice of the freemen of the colony, of the officers directed by the charter, and at the times and for the terms fixed by the charter.

2d. That a continuance of the mode of election contemplated by the charter, of assembling all the freemen at the same place on the same day, and having them all then vote

at the same poll, had, from the increase and extension of the population of the colony, become impossible in practice.

3d. That the change of form was avowedly adopted "for the good and welfare of the said company," and to the Legislature did "seem meet," because the expression of the choice of the freemen, made by his written ballot, designating the name of each person for whom he chose to vote, and the office which he designed each person, voted for by him, should fill, identified by the endorsement of his full proper name upon the back thereof, and sent to Newport under seal, was securing to that freeman as perfect an exercise of his privilege of voting, as if he had gone to Newport to deposite that same ballot there.

4th. That for these causes the Legislature well considered this change one of those "forms and ceremonies of government and magistracy" that they might "make, ordain, constitute, or repeal, for the good and welfare of the said company," without any violation of the spirit and meaning of the charter.

5th. That the only possible cause of complaint which could grow out of this change in the form of voting, was the failure, upon the ballot, to make a choice of the officers to be voted for by a majority of all the votes given for each office, and that such failure was only an event, when it should happen, to operate to the inconvenience of those freemen for whose convenience the system of voting by proxy was adopted.

6th. That the system of voting adopted by the act of 1760, and, in all substantial particulars, yet maintained, is the least departure from the literal and technical requirements of the charter which could be devised; if the personal attendance of the freemen of the whole State at Newport on the same day, to vote at the same poll, is to be dispensed with; and, therefore, goes far to exhibit a determination, on the part of the Legislature and the people, to conform to the strict language of the charter, so far as that can be done in the present state of the territory and population over which the authority of the charter is held to be binding.

*The fourth* infringement enumerated by the majority of the committee, grows out of an act of the Legislature of the State of Rhode Island, entitled "An act to provide for the performance of the duties of Governor in certain cases, and, also, for regulating the sitting of the General Assembly."

[See *Digest of 1822*, page 99.] By reference to the book here referred to, it will be perceived that this act, also, in some form, was passed as early as 1663. The majority of the committee find in this act what they consider two material departures, by the legislative power, from the provisions of the charter. The first is found in the first section of the act which devolves the duties of Governor upon the Lieutenant Governor, in case the office of Governor shall be vacant "by reason of no election being made by the freemen, or by

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the Governor's death or resignation, or in case of his absence from the State, or inability to perform the duties and functions of his office ;" and in case of a vacancy, for similar reasons, of both the offices of Governor and Lieutenant Governor, the duties are devolved upon "the senior Senator in rank for the time being." To determine how far this act may be assumed as an infringement upon the provisions of the charter, or a departure from them, those provisions, so far as the office and duties of the Governor and Deputy Governor are concerned, should be examined ; and the undersigned feels confident that such an examination will not result in any necessary violation of, or departure from, the charter, to any extent whatever. The charter, in all cases, in speaking of the powers and duties of the Governor, uses this or similar language—"and in his absence the Deputy Governor:" thus showing that the Deputy Governor, in case of the absence of the Governor, whether occasioned by a vacancy in the office or otherwise, is to stand in his place and discharge his duties. It will be further seen that the Governor, or, in his absence, the Deputy Governor, is constituted the presiding officer of the Senate, and of the grand committee when the two Houses are acting together as one body. Now, a vacancy may exist in both these offices at the same time, or, during the absence of one, a vacancy may be produced in the other. Still the Senate, if in session, would require a presiding officer, and this law provides for the case. If a vacancy be occasioned in the office of Governor, Lieutenant Governor, or Senator, by death or removal from office, the Legislature can fill the vacancy ; but if vacancies for these causes should be produced in both the offices of Governor and Lieutenant Governor at the same time, the Senate and grand committee would require a presiding officer, and the State a person to do this duty, until an election could be made by the Legislature. The first section of this act is not understood to go any further than to make this provision, as the proviso would seem to negative the idea that this *pro tempore* Governor can sign commissions, which is believed to be the only remaining important duty to be performed by the Governor of the State. This, therefore, is not perceived to be an infringement of the charter, in the sense in which it is used by the majority of the committee. The Senator upon whom the duty is devolved, in case the double contingency should happen, must have been elected by the people as a member of the body over which he is to preside, and it is believed that, by a fair implication from the charter itself, the Senate, without this law, would have had the right, in the absence of both the Governor and Lieutenant Governor, to have designated one of their body to preside over their deliberations.

The provision contained in the second section of the law authorizing the Governor, or the person empowered to per-

form the duties of Governor, to convene the Legislature 1834.  
 “when any emergent occasion shall require,” and when the 23d CONGRESS,  
 law shall not have provided for a meeting, forms the second. 1st SESSION.  
 ground assumed by the majority of the committee under this Report by the  
 head. This provision, it is believed, instead of being a vio- minority of the  
 lation of, or departure from, the charter, is expressly autho- committee.  
 rized by it. At pages six and seven of the charter, (see Digest of 1822 of the laws of Rhode Island,) will be found the following provision: “And, further, we will, and by these presents, for us, our heirs, and successors, do ordain and grant, that the Governor of the said company for the time being, or, in his absence, by occasion of sickness or otherwise, by his leave and permission, the Deputy Governor for the time being, shall and may, from time to time, upon all occasions, give order, for the assembling of the said company, and calling them together, to consult and advise of the business and affairs of the said company.” Upon looking at the language of the charter, it will be seen that its language, when speaking of the Legislature, is most frequently “the Governor, Deputy Governor, assistants, and company,” and hence the conclusion is, that the authority conferred in the above paragraph is to convene the Legislature, and not the whole body of the freemen of the colony, as the charter makes it the especial duty of the Legislature, and not of the whole body of the freemen, “to consult and advise of the business and affairs of the said company.” But if this view of this point be mistaken, and the authority “to appoint times and places of the meeting of the General Assembly” be, as the majority of the committee suppose, given to that body only, still it would appear to the undersigned not to be a usurpation of this legislative authority to fix those times and places, so far as human foresight could measure the necessity of such meetings, while the Legislature should be together, and to provide that, in case urgent occasion should require, during any recess, the Governor should convene them. He cannot therefore view this provision in the legislation of the State as going at all to sanction the position for which it is referred to, that the Legislature have not regarded the charter as the fundamental law of the State.

The majority of the committee draw an argument in favor of the power in the Legislature of Rhode Island to pass laws fundamental in their character, because that Legislature has passed an act entitled “An act declaratory of certain rights of the people of this State,” commonly called A Bill of Rights. They say that this bill, “in all the other States, emanates from the people, in their primary capacity,” while in Rhode Island it is a mere act of the Legislature. The undersigned believes it to be true that most, if not all, of the States, at the formation of their respective constitutions, have either incorporated into that instrument, or have accompanied it by a bill or declaration of rights, which in the one shape or the

1834. other has received the approbation of the people in their pri-  
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Report by the of rights, previous to the time of the formation of a State  
 minority of the constitution for such State. He further believes that most,  
 committee. if not all, of the old States had bills of rights passed by their

respective legislative assemblies prior to the time of the revolution, and that those bills of rights remained, with legislative sanction and authority, only until the States respectively formed constitutions, and in or with them submitted to their people, for their adoption, their bills of rights. He therefore supposes that the majority of the committee, in this instance, reason from an analogy which does not exist, inasmuch as the State of Rhode Island has never yet formed a constitution, but remains in this respect as it was at the close of the revolution, and with the same bill of rights and same form of government. But even if this argument should be allowed its full force, it would not seem to the undersigned to prove any thing as to the question under discussion. This bill of rights contains nothing which conflicts with any provision of the charter, and it would be one thing to determine that the Legislature of Rhode Island possesses the power to pass laws in their character fundamental, in cases where no such laws exist, and an entirely different thing to determine that that body possesses the power to pass such laws in contravention of the provisions of the charter, that being, so far as its provisions extend, the fundamental law of the State.

The majority of the committee further say, in an enumeration of what they consider legislative infringements upon the charter, "the right of suffrage has been extended to a class of citizens who did not enjoy it under the charter." The undersigned presumes the majority of the committee are right in the fact stated, though his acquaintance with the laws of the State does not enable him to speak other than from the statement in the report; but an examination of the charter will show that this subject is expressly put within the enumerated powers of the Legislature, and that, therefore, any extension of the right of suffrage by that body cannot be an infringement upon their chartered rights. The incorporating clause of the charter, after naming certain individuals, is in the following language: "And all such others as now are, or hereafter shall be, admitted and made free of the company and society of our colony of Providence Plantations, in the Narragansett bay, in New England, shall be from time to time, and forever hereafter, a body corporate and politic, in fact and name, by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations, in New England, in America." [*See Charter, page 5, Digest of 1822.*]

Among the enumerated powers of the Legislature is the following: "And to choose, nominate, and appoint such and



so many other persons as they shall think fit, and shall be willing to accept the same, to be free of the said company and body politic, and them into the said company to admit." No extension, therefore, by the Legislature, of the right of suffrage to classes of citizens who did not possess that right at the time of the adoption of the charter, could be an infringement upon that instrument, as it grants to the Legislature this power, in express terms, to be used as it "shall think fit."

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This closes the notice which the undersigned proposes to take of the legislative infringements upon the charter, mentioned and relied upon by the majority of the committee to show that the Legislature of Rhode Island does not, and has not for a long time, considered it as fundamental law binding its action; but there is one consideration equally applicable to all these alleged legislative encroachments, which ought not to be withheld. It is, that the previous review, as well as the statements made by the majority of the committee, show that they all took place before the American revolution, and while the State was a British colony. The charter, therefore, was then strictly and legally binding, for it was a grant by deed from the sovereign to his subjects, and they could take no rights under the charter which it did not grant, and exercise no powers derived from it in a manner different from that which it pointed out. The authorities and people of the colony were then one party to the charter, and the sovereign was the other; and holding their authority, as they all did, by virtue of the charter, any act of those authorities which was in violation of it must have been legally void. It surely would not have been permitted to the colonists, while British subjects, to say, we have disobeyed and violated the charter; we have legislated above and beyond it; we have established a Government not at all in conformity to its provisions; we have introduced a mode of elections which it does not authorize; we have organized a Legislature upon principles contrary to its requirements, and which does not acknowledge its binding force, but sets up its acts as paramount to your charter: therefore we do not hold it to be the fundamental law of the colony. Still the most material of the legislative acts mentioned and relied upon to show that the charter has not been held to control the action of the legislative body organized under it were passed within three years after the date of the charter, and more than a century before those to whom it was granted ceased to be the subjects of the Crown from which the grant was made. Can stronger evidence be required to show that these acts were never considered as violations of the spirit and meaning of the charter, either by the sovereign who granted, or by the people who accepted and adopted it as their system of civil government? It would seem to the undersigned that this view of the subject must be conclusive against the interpretation given to these acts by the majority of the committee.



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He cannot, therefore, in any light in which he has been able to view the question, believe there is evidence to authorize the assumption that this charter of Charles II has not ever been, and is not now, considered by the people of Rhode Island as their constitution of government to the full extent of its provisions in their true spirit and meaning, with the single exception of those portions of it which were made obsolete by the American revolution. On the contrary, the evidences are clear and strong to his mind, to show that it has ever been held to be the fundamental law of that State by its people, its Government, and its Legislature, (the act of January, 1832, alone forming a material exception;) and he refers to the present basis of representation in the popular branch of the Legislature, and to the present mode of conducting the elections for general officers, as conclusive of the question.

This brings the undersigned to his second inquiry, to wit: Does the charter fix and prescribe the term of office of the Governor, Lieutenant Governor, and Senators of the State?

The language of the charter itself must settle this point. The whole of the paragraph has been quoted in the statement of facts given in the early part of this report, and a reference to that extract will show its requirement to be, "that yearly, *once in the year, forever hereafter*, namely, the aforesaid Wednesday in May," "the Governor, Deputy Governor, and assistants of the said company," "shall be" "*newly chosen for the year ensuing.*" It is respectfully submitted that this language is definite and clear; that the term of one year is fixed by it as the period of service, or official term, of the Governor, Lieutenant Governor, and Senators of Rhode Island, by virtue of an election by the people to those offices; and that it does not admit of extension by any fair construction of the terms used, or the meaning conveyed. Is there then any thing in the charter to modify this construction of this provision? The majority of the committee seem to suppose there is; as, in reference to this subject, they use the following language: "It seems, on the contrary, to have been the intention of the Crown to perpetuate the existence of the legislative power in the colony, by an express provision that the authority, office, and power of the Governor, Deputy Governor, and assistants, shall cease and determine when their successors shall be elected and engaged, and not at the expiration of the term for which they were respectively chosen." The undersigned believes, had the majority of the committee extracted the passage of the charter to which they must have referred for the above opinion, that they would have seen its want of applicability to the question they were discussing. The passage is considered as solely applicable to cases of removal from these offices by death, or for cause, and not to vacancies occasioned in any other manner. As, however, the majority of the

committee have seemed to consider it as susceptible of a different construction, the undersigned feels bound to give it to the Senate, that it may form its own opinion of its extent and application. It is in the following words: "And if it shall happen that the present Governor, Deputy Governor, and assistants, by these presents appointed, or any such as shall hereafter be newly chosen in their rooms, or any of them, or any other the officers of the said company, shall die, or be removed from his or their several offices or places before the said general day of election, (whom we do hereby declare, for any misdemeanor or default, to be removable by the Governor, assistants, and company, or such greater part of them, in any of the said public courts to be assembled as aforesaid,) that then, and in every *such* case, it shall and may be lawful to and for the said Governor, Deputy Governor, assistants, and company aforesaid, or such greater part of them, so to be assembled as aforesaid, in any of their assemblies, to proceed to a new election of one or more of their company, in the room or place, rooms or places, of such officer or officers *so dying or removed*, according to their discretions; and immediately upon and after such election or elections made of such Governor, Deputy Governor, assistant or assistants, or any other officer of the said company, in manner and form aforesaid, the authority, office, and power, before given to the former Governor, Deputy Governor, and other officer or officers *so removed*, in whose stead and place new shall be chosen, shall, as to him and them, and every of them respectively, cease and determine."

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A careful examination of this clause of the charter will show that it first contemplates a vacancy in the office of Governor, Deputy Governor, or an assistant, by death, or, second, by removal from office, which, "for any misdemeanor or default," it authorizes; and in either case, it empowers the Legislature to make an election to fill the vacancy so occasioned: and then declares that, after such election is made, "the authority, office, and power" of the officer "removed" shall "cease and determine." This is the whole scope of the provision, and the majority of the committee must, therefore, have been mistaken in supposing that it was applicable to a case of vacancy in any of these offices occasioned by a failure of the people to elect. It applies solely to elections made by the Legislature; and there is no authority given by the charter to the Legislature to fill a vacancy in the office of Governor, Deputy Governor, or an assistant, occasioned in any other manner than by the death of the incumbent, or his removal from office for some "misdemeanor or default."

The undersigned finds no other provision in the charter which can, to his understanding, be possibly supposed to have any application to the official terms of the Governor, Lieutenant Governor, and Senators; and as he cannot suppose the clause last above quoted and referred to can be

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understood as reaching any cases other than the two classes of cases he has mentioned, to wit, the death of the incumbent, and his removal from office for cause, he is forced to the conclusion that the charter does limit the term of office of the Governor, Lieutenant Governor, and Senators to one year, "the year ensuing" the pronunciation of their election in the General Assembly convened at Newport; and that there is nothing in the other provisions of that instrument to qualify this limitation.

Can, then, the Legislature of the State, consistently with the powers granted to that body by the charter, extend the official terms of those officers beyond the limits fixed by the charter?

This inquiry would seem to have been already answered; for, if it be admitted that the charter is the fundamental law of the State, and, as such, binding upon its Legislature, and that it does fix the official terms of the Governor, Lieutenant Governor, and Senators at one year, it must follow that an extension of those terms beyond the period fixed by the charter would be an act of legislation above and beyond the charter in a case where it makes express provision, and, therefore, an act of legislation not authorized by the charter, but in direct violation of it. Such are the impressions fully entertained by the undersigned; but it is his duty to notice some of the positions by which the majority of the committee sustain themselves in an opposite conclusion.

It will at once be seen that this discussion involves the constitutionality and validity of so much of the act of January, 1832, as extends the terms of office of the Governor, Lieutenant Governor, and Senators, in case of a failure to elect by the people, and, therefore, has direct reference to the arguments by which the majority of the committee sustain that act.

The first position, in order, taken by the majority of the committee, which it is proposed to notice, is laid down in the following words: "Your committee hold it to be an undeniable principle, applicable to all forms of government, that there must exist in the supreme legislative power of the State a capacity to preserve itself from annihilation."

This is a position to the soundness of which the undersigned cannot subscribe as applicable to any of the forms of government adopted by any of the States of this Union, or by the Federal Government. He supposes Congress to be "the supreme legislative power" of this Government; but Congress has, by the constitution of the United States, no capacity to preserve itself from annihilation. If the people should fail to elect members to the House of Representatives, or if the Legislatures of the States should fail to elect members to the Senate, there would be no Congress, nor could Congress itself continue itself beyond the terms for which its members have been elected, or in any other way,

by its action, bring a new Congress into existence. Congress, therefore, which is the supreme legislative power of the United States, has not the capacity to preserve its continued existence, or to prevent its own annihilation.

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The undersigned, from the time allowed him to prepare this report, has not been able to examine very extensively the constitutions of the several States, nor have his former researches made him familiar with the minute provisions of those instruments; but, from the examinations he has been enabled to make, he entertains the opinion that no such power is conferred upon any one of the legislative bodies organized by those instruments as that of continuing itself in official existence, by its own act, beyond the term for which its members were elected. He believes that the members of the Legislatures of all the States are elective by the free-men of the respective States, and, in the constitutions of some, no provision is made for a failure by the people to elect, and no mode of remedying such failure, but that of a resubmission to the people, has ever been attempted by the Legislatures of those States. The constitutions of other States provide for filling the vacancies which may exist, from failures to elect, by the choice of such of the members of one or both branches of the new Legislature as may have been elected, generally confining that choice to a certain number of the candidates voted for by the people for the office to be filled. Other States, where legal quorums are elected, suffer the vacancies occasioned by a failure to elect to remain unfilled until another regular election. There may be cases where the constitution of a State provides that the members of the old Legislature shall continue to act until others are elected and qualified to fill their places, but the undersigned has been able to find no such case, nor does he believe that one exists. He believes that the constitution of every State fixes definitively the length of the official term of the members of its Legislature, and that without a re-election by the people, or some other re-election or reappointment prescribed by the constitution of the State, the official powers of every member of the State Legislatures cease with the close of the term for which he was elected, whether any other person be or be not qualified to discharge the same duties.

Surely, in the first class of the above cases, where the State constitution makes no provision for a failure to elect, and a new election is the only remedy within the power of the Legislature, "the capacity to preserve itself from annihilation" does not exist in the Legislature, the official terms of the members of which have expired. That capacity is in the people alone, and their election must determine the continuance or not of the legislative power.

In the second class of cases, where vacancies occasioned by a failure to elect are to be filled by such members of one

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or both branches of the new Legislature as may have been elected, the capacity may exist in each Legislature to preserve itself, but not its succession; and even this must depend upon the success of the people in electing a portion of the members; for if there should be a failure to elect the whole, or if the people should hold no election, there would be no one authorized to fill vacancies, and annihilation would follow. Such a Legislature, therefore, has only *sub modo* the "capacity to preserve itself from annihilation," and has not at all that capacity, in the sense in which the majority of the committee are understood to use it, to preserve its succession.

The third class, where the constitution of the State authorizes the members of the existing Legislature to hold their offices and exercise their powers until others are elected or appointed, and duly qualified to take their places, if, indeed, such a provision exists in the constitution of any one of the States, is still not a capacity which exists in the legislative power to preserve itself from annihilation, but a provision which exists in the constitution of the State to preserve its Legislature from annihilation. The power or capacity is constitutional and not legislative; and, therefore, even in this class of cases, does not bear out the majority of the committee in the position they have laid down.

The undersigned may have misapprehended the meaning which the majority of the committee intended to give to the position itself, as they may have attached to the terms "supreme legislative power of the State" ideas which, as used, they have not conveyed to his mind. He has considered them as used in reference to the legislative bodies of the United States, and to legislative bodies acting in subjection to fundamental law paramount to the powers of the legislative authority; indeed, from which the Legislature derives its authority. If the position has not been taken in this sense, then the undersigned must admit that his replies to it may be a departure from the intention of the proposition; but he must, at the same time, say, that he thinks, in any other sense, the proposition is a departure from the argument it is used to support.

The next position assumed by the majority of the committee to sustain this act of January, 1832, is, that neither in the charter, nor in the bill of rights, "nor in any other act or instrument now in force, is there to be found any prohibition of the power to continue over an existing Legislature until their successors shall be duly chosen and engaged." The reasoning to support this position is, that the constitutions of the several States are, in the broadest sense, popular, and that the legislative power granted by them embraces every object not expressly prohibited by some provision in the instrument itself, or by a bill of rights. In reference to powers legislative in their nature and character, and not



enumerated or particularly granted, this reasoning, and the deduction from it, may be generally sound, as applicable to the State constitutions. It is respectfully submitted, however, that the establishment and organization of the legislative bodies, and, as a necessary part of that establishment and organization, the limitation of the terms of the members, is, under our system, a constitutional and not a legislative power; and, therefore, not coming within the scope of the reasoning of the committee, cannot be controlled by the conclusion drawn from that reasoning. But, in the present case, this point is not left to reasoning and inference. We have already seen that the terms of the members of the Senate of Rhode Island are specifically fixed by the charter to one year. The constitution has provided for the case in terms, and its grant is positive, definite, and clear. It surely then will not be contended that this term may be extended without a violation of the grant, because the granting clause does not contain a prohibition against its violation. It is a settled rule of construction, that an affirmative and positive grant, clear and intelligible in its terms, is itself a negative of what is not granted. The constitution of the United States fixes the term of a Senator at six years; and it surely would have been considered surplusage in that instrument to have added that the term of a Senator should be no more than six years: nor will it be supposed that Congress can prolong that term, because that negative is not affixed to the grant. This position, therefore, cannot sustain the action of the Legislature of Rhode Island in attempting, by a legislative act, to prolong the term of the Senators of that State beyond the period limited and prescribed by the fundamental law of the State.

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The majority of the committee further contend that the people of the State of Rhode Island sanctioned the act of January, 1832, by holding elections pursuant to its provisions. The undersigned believes that, in using this argument, the majority of the committee have not taken the proper distinction between the different provisions of that act. It has not been contended, to the knowledge of the undersigned, that those parts of the act which directed new elections in cases of failure to elect at the annual elections, were unconstitutional or invalid. On the contrary, he understands that those provisions of the law are insisted upon as valid and binding, and that it is complained that the House of Representatives did not carry them into effect according to their plain intent and meaning. It will be found to have been made a distinct point by Mr. Potter, in his argument, that, even supposing all parts of the law of January, 1832, were constitutional and valid, the election of Mr. Robbins to the Senate was improperly made, because, if that law had been properly carried into effect, there would have been two or three sessions of the Legislature of the State between Janu-



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ary, 1833, when that election was made, and the 3d of March, 1833, when his former term expired ; while the law of the State regulating the election of United States Senators requires that election to be made "at the session of the General Assembly next preceding the expiration of the term of service of the Senator for the time being, and not before."

His reasoning upon the subject is, that it was the intention of that law that elections should be held as frequently as that could be done, the returns made, and the results ascertained, until a choice of Governor, Lieutenant Governor, and Senators, should be effected ; that the law fixed the period of thirty days as the longest notice which should be given of a special election to be held under it ; that several of those elections were held upon a much shorter notice, and proved that elections might be held once in thirty days without difficulty ; that these elections were continued at intervals differing not very widely from this until the October session of the Legislature in 1832 ; that, after that period, but one election was held under the law ; that, at the session in January, 1833, the Legislature, instead of adjourning to such a day as would give time for another trial to elect a Senate, and so continuing to do from time to time until the law made it imperative upon them to elect a Senator at any time before, or even on the 3d day of March, 1833, then proceeded to make that election, the House of Representatives having first resolved that they would order no more elections under the law ; that, by this proceeding, the persons acting as the Governor, Lieutenant Governor, and Senate, under the law of January, 1832, who were elected in April, 1831, without any reference to the election of a Senator, were made actors in that election, and actually gave their votes for Mr. Robbins, by which votes he was elected, when, if new elections had been ordered, as they should have been, other sessions of the Legislature would have intervened between January and March, and the people would have had an opportunity to elect a Governor, Lieutenant Governor, and Senate, with a view to the election of a Senator ; that the fact that an election was effected at the first trial after November, 1832, proves very clearly that, had elections been ordered ; some choice would have been effected before March, 1833, and before the expiration of the then term of Mr. Robbins ; while the total change produced by the election in the Governor, Lieutenant Governor, and Senate, proves conclusively that the public will was not represented by the former incumbents of those offices.

These suggestions are given here in as condensed a form as possible, that the Senate may allow them such weight in the decision of this important controversy as this body may think they deserve. They must, in any event, satisfy the Senate that these elections, held in obedience to the law of January, 1832, furnish no evidence of the acquiescence of

the people of that State in any of the provisions of that law, other than those applicable to the special elections, the validity of which provisions have not been, and are not now, disputed. Indeed, from the fact that that law charged the House of Representatives alone with the execution of this portion of it, an argument has been drawn that it was not the intention of the Legislature which passed the act that any business of an official or legislative character should be performed by the Senate after the expiration of their constitutional terms, and that the provisions in the law for the official continuance of the Governor, Lieutenant Governor, and Senators were designed as a mere formal continuance of the legislative body until an election by the people should be effected. The terms of the act, however, as will be seen by a reference to it, go very strongly to contradict this construction of it.

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Another position taken by the majority of the committee to sustain the validity of the act of January, 1832, is based upon the action of the supreme judicial court of the State of Rhode Island. The paper annexed, marked O, contains the evidence of the proceedings referred to. The facts seem to be, that a person by the name of Miner was indicted, in September, 1832, for murder; that he was tried, in March, 1833, before this court, convicted, and sentenced to be hung in July, 1833. He presented to the court an application for a *habeas corpus*, upon the ground that the judges had not been appointed by a competent Legislature, and were not, therefore, empowered to try and sentence him. The court refused the application, but the grounds of the decision are not stated. It is contended that this decision was a pronouncement of the judgment of that court in favor of the validity of the law of January, 1832. Mr. Potter makes two answers to this point. The first is, that the statute of the State expressly denies to this court the authority to grant a *habeas corpus* on the application of persons "committed for a capital crime," "or persons convicted."—[*See the Revised Laws of Rhode Island of 1822, page 181.*] To this it is replied, as it would seem to the undersigned, with much force, that, notwithstanding the prohibition of the statute, it would be competent for the court to examine such an application, where the allegation was that the whole proceedings had been *coram non jure*; and, if such should, in their judgments, be the fact, that the case would not come within the prohibition of the statute, and the writ might be granted. The second answer is, that the judges of this court were the same persons, from the first Wednesday in May, 1831, until the first Wednesday in May, 1833; that it is admitted on all hands that their appointments and terms of service were within the power of the Legislature, though the practice has been to make the appointments annually; that these judges were properly appointed and commissioned in 1831; that a resolution, having the force of a law, is always passed by

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every Legislature of Rhode Island, declaring that all officers, in whose places no others have been appointed by the Legislature, or who have not been themselves reappointed, shall continue to hold their respective offices until others shall be duly appointed and qualified to take their places; that a similar resolution was passed by the Legislature in office, from May, 1831, to May, 1832; that these judges did hold their offices, and continue to discharge their duties as judges, by virtue of their appointment in 1831, and of the resolution above described, until August, 1832, although their year expired in the month of May, 1832; that the body acting as the Legislature in August, 1832, but whose right so to act is now disputed, did, in that month, assume to reappoint these judges; but it is said that, if it shall be determined that this body was not the Legislature of the State authorized to perform the constitutional duties of the Legislature of the State, then their assuming to reappoint these judges would neither add to, nor take from, the powers they possessed before that act was performed; that they were continuing in office at the time by virtue of the resolution before mentioned; that they would so continue until removed from office, or reappointed by a constitutional Legislature; and that therefore their decision in the case referred to does not, necessarily, carry with it the decision of that court in favor of the validity of the act of January, 1832, because, if they had decided expressly that that law was invalid, and their purported reappointment in August, 1832, void, they would still have been compelled to decide that they were, in office by virtue of the resolution of the previous competent Legislature, as well after as before August, and, being so in office, were a competent court to try and sentence the criminal in question. This reasoning seems to the undersigned to follow necessarily from the facts, and to render wholly inconclusive this action of the court as a decision in favor of the validity of the law under consideration.

The Legislature which declared void the election of Mr. Robbins, and elected Mr. Potter, in the preamble to the act making that declaration, denominate the body which made the election of Mr. Robbins "the General Assembly," and assign, as the ground upon which they declare void their proceedings in that particular, the non-compliance with the act of January, 1832. The majority of the committee consider this an admission sustaining the validity of that act. This same Legislature also, at their first session, repealed the act of January, 1832, without expressing any opinion in the repealing act that the act to be repealed was not valid. This the majority of the committee also consider an admission to the same effect. How far admissions by this subsequent Legislature, if made, would render valid an unconstitutional law passed by a preceding Legislature, or how far such admissions are to be considered evidence of the

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constitutionality of such a law, when that is the point in issue, are questions which the undersigned leaves to the determination of the Senate. These admissions, however, appear to him to have been made, so far as they can be considered admissions at all, under circumstances which should be considered. The Legislature of Rhode Island, at its October session, in the year 1833, pass an act, in which they declare the election of Mr. Robbins to the Senate, "to be null and void, and of no effect," and that the office of Senator is vacant, not that the office is thereby vacated, but that it is "vacant." To that act they affix a preamble, in which they term the body of men which made the election that they are about to declare void, "the General Assembly," and accuse them of a non-compliance with the law by virtue of which they held their offices, and this preamble is followed by the law which declares null and void the act referred to. Now, it would not do to assume that any thing contained in this preamble was designed as an admission of the validity of the election of Mr. Robbins, because it was the sole object of it, and of the law to which it is the preamble, to declare that election void; and it will not be contended that the preamble to any legislative act is to be so construed as to contradict, defeat, and overrule the act itself, which is the only part of the proceeding having validity. This Legislature, then, did not intend to admit that Mr. Robbins had been validly elected to the Senate of the United States, but to deny that fact, and to declare not *voidable*, but *void*, the proceeding by which he purported to have been so elected; and the preamble to the act must be so understood and construed as to be consistent with this intention. Two grounds were assumed upon which that election was void: 1st. That the law of January, 1832, so far as it purported to continue the terms of office of the Governor, Lieutenant Governor, and Senators, was in direct violation of the constitution of the State, and therefore void, and that the persons assuming to act as a Governor and Senate in the election of Mr. Robbins were not constitutionally a Governor and Senate, and were not authorized so to act. 2d. That the Governor and Senate for the time being held their offices, not by virtue of an election by the people, but by virtue of the act of January, 1832, and that a failure to comply strictly with the provisions of that act had put an end to the powers they derived from it, and, therefore, that they had no power to act in the election of a Senator. The subsequent Legislature appear, from this preamble to their act, to have assumed the latter ground as the foundation of their action, and any thing in the shape of an admission in the preamble would seem to be properly referrible to the views they entertained, and upon which they were acting, and not to connect itself with a view of the subject which does not appear, from their proceedings,

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to have influenced their action. If, therefore, the ground assumed by this Legislature should be held to be untenable, and the ground first above mentioned, to wit, that the act of January, 1832, so far as it purports to extend the official terms of the Governor, Lieutenant Governor, and Senators, is in direct violation of the constitution of the State, and therefore void, be well taken, the undersigned is unable to discover that any thing in the admissions supposed to be contained in this preamble can weaken or overturn it. In reference to the admission supposed to be drawn from the silence of the act repealing the act of January, 1832, the undersigned will simply remark, that this was an act to repeal a law, parts of which were held to be unconstitutional and void, and other parts of which were admitted on all hands to be valid and binding as law; and, under these circumstances, he cannot consider the absence of a declaration pointing out those parts which were held to be unconstitutional, inasmuch as it was the object of the Legislature to repeal the whole act, as going very far to sanction the whole act.

The majority of the committee mention the action of the Legislature of Rhode Island in relation to the election of members of Congress, and the introduction of the plurality instead of the majority of votes to elect in the choice of those officers, as going to show the extent to which the Legislature have gone in regulating elections, contrary to the long established customs of the State. Two remarks may be made in relation to this argument. The first is, that the charter could not necessarily have contained any provision in relation to the election of these officers, inasmuch as it was granted for the Government of a British colony, and not of the State of Rhode Island as a member of the confederacy of States composing this Government, and was granted more than a century before such a thing as a Congress of the United States of America was known or had existence; whence, from necessity, the Legislature must have full power over that whole subject. The second is, that the fact that the Legislature of Rhode Island extended, by law, the plurality mode of election to the choice of members of Congress, where the charter does not interfere, and did not extend it to the election of officers of the State Government, where the charter prescribes the majority principle, affords at least as strong an inference in favor of their sense of the binding and paramount influence of the charter, where it does direct, as of any disposition to treat it lightly by disregarding the mere analogy when acting upon a case not known to the charter.

So much for the arguments which have been adduced by the majority of the committee to sustain the validity of the act of January, 1832.

In corroboration of the point now under discussion, however, to wit, that the terms of the Governor and Senate can



be continued beyond the year, the majority of the committee assume that these officers always have held over until the election was completed, and their successors qualified. A perfect understanding of the facts, it is believed, will make this point plain. From the statements of the parties annexed, and before-referred to, it is to be seen that the practice of the Legislature of Rhode Island has ever been to adjourn to meet on the day previous to that fixed in the charter for the annual election, and that, pursuant to such adjournment, a quorum of both Houses assemble on that day always at Newport, the place named in the charter for holding the annual elections. It is undoubtedly true, as the majority of the committee remark, that when the people all assembled and voted at that place, they might remain together until an election was effected, and that the Governor and Senate of the former year might remain until that result was ascertained, but there is not found any provision in the charter making them, at that time, presiding officers of the election, or imposing upon them any other official duties after the opening of the election. The new House of Representatives always assembled on the day fixed for the election, and took the oaths of office on that day. They always acted as the canvassers of the votes, and the result of the election was declared by that body. Since the system of voting by proxy, as before described, has been adopted, the proxies have always been returned to Newport, and canvassed by the new House of Representatives, as the votes given by the people there assembled formerly were. They declare the result as they formerly did; and the election is closed. If a Governor, Lieutenant Governor, and Senate are found to be elected, the persons elected are sworn, and the Legislature is organized; and, as an election of a Governor, Lieutenant Governor, and a quorum of the Senate, has never failed to be made until the first Wednesday in May, 1832, the history of the Government of the colony and State furnishes no precedent for such a case as that under consideration, where the former Governor, Lieutenant Governor, and Senators, or any of those officers, have held over, and attempted to perform official acts, because successors were not elected. That history does, however, present several instances where the whole number of Senators have not been elected, and no attempt has been made to fill the vacancies by a new election, or in any other manner, nor have the former incumbents of the vacant seats ever claimed to hold over the terms for which they were elected, but the vacancies have, in all such cases, been suffered to remain for the year. It should be further remarked that no evidence is found to show that any election has occupied more than the day fixed in the charter, so that any presumption of a holding over of these officers in consequence of a failure to elect on that day, is unsupported by evidence.

From these facts, it would seem to the undersigned to

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follow, necessarily, that the old Governor and Senate are brought together by the adjournment of the Legislature to the day previous to the election; that subsequent to that day, unless re-elected, they have never had any official duty to perform, and have never performed any; that the right to hold over, in case of a failure to elect, had not been admitted in the practice of the Government under the charter, because repeated instances have happened where failures to fill places in the Senate have occurred, and the incumbents have not continued to occupy them, but they have remained vacant for the whole year; that the holding over referred to by the majority of the committee has relation only to the day of election, and then these officers, unless re-elected, have no official duties to perform; and that, therefore, the holding over of the Governor, Lieutenant Governor, and Senators of that State, from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, in consequence of a failure of the people to elect, was not sanctioned by any former practice of the Government under the charter, and must be held to have been done by virtue of, and in obedience to, the act of January, 1832, and not by virtue of any provision in the charter, or in conformity with any former precedent.

The opinion of the undersigned as to the validity of such of the provisions of that law as assumed to extend the official terms of these officers, has been given in his remarks under the two first heads of this report, where it will be seen that he has come to the conclusion that the charter is to be regarded, as to this question, as the fundamental law of the State, binding upon its Legislature, and that it does limit, specifically, their official terms to one year.

As it has been intimated in some one of the statements of fact that the duty of swearing the new Governor, Lieutenant Governor, and Senators, devolved upon the old officers, as an official act to be performed by them after the election had been effected, it may be proper to refer here to the paper annexed, marked P, to show that, for a long term of years at least, this duty has been performed by the Secretary of State, and not by them.

This brings the undersigned to his fourth inquiry, which is, can the Senate of the United States, when these questions are presented to it by the action of the Legislature of the State of Rhode Island, in the purported election of a member for this body, look into and pronounce its opinion upon them, by way of inquiry into the right of a sitting member to the seat he occupies?

Two bodies of men, calling themselves the Senate and House of Representatives of the State of Rhode Island, and, together, acting as the Legislature of that State from the first Wednesday in May, 1832, to the first Wednesday in May, 1833, did, in January, 1833, assume to elect Asher Robbins to the Senate of the United States, for the term of six years

from and after the third day of March then next, to fill a vacancy to be produced by the expiration of his then term of office on the last mentioned day. Mr. Robbins received a majority of the votes given by these two bodies of men, for the office, and the election was conducted according to the forms pursued by the Legislature of Rhode Island in the election of Senators. The result of the election was pronounced in the usual manner, and the person acting as Governor of the State at the time, issued to Mr. Robbins a commission in the usual form, and authenticated in the usual manner, for the office. This commission was presented to, and read in the Senate of the United States, on the fourth day of February, 1833, and placed upon the files of that body.

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This election of Mr. Robbins was protested against by several members of the House of Representatives of that State soon after it was made, (see protest annexed, marked Q,) and has ever since been alleged to have been void, on the ground that the persons acting as the Governor, Lieutenant Governor, and Senators of the State, at the time of the election, and aiding in making it, were not constitutionally the Governor, Lieutenant Governor, and Senators of the State, nor authorized to perform that act, and, of consequence, that the person acting as the Governor of the State, and, as such, signing Mr. Robbins's commission, was not constitutionally the Governor of the State, nor authorized to perform that act. In the month of October, 1833, two other bodies of men, admitted to be the Senate and House of Representatives of the State of Rhode Island, were assembled, and constituted the Legislature of that State, and, while so assembled, this Legislature passed the law to be found annexed to the report of the majority of the committee, and marked A, declaring the election of Mr. Robbins "null and void, and of no effect," and the office to be "vacant." This same Legislature then proceeded to elect a Senator to fill the vacancy which they alleged existed by the expiration of Mr. Robbins's former term in March previous, and, upon counting the votes given, Elisha R. Potter was found to have received a majority of the whole, and was declared to have been duly elected. The election was conducted in the usual manner, and the person admitted to be the Governor of the State issued to Mr. Potter a commission for the office in the usual form, and with the proper authentications. This commission was presented to the Senate of the United States, and read in that body on the first day of its present session, and at the same time Mr. Robbins and Mr. Potter both presented themselves at the bar, and each offered to take the oath of office as a Senator of the United States from the State of Rhode Island.

This is believed to be a sufficient summary of the facts to present this point intelligibly to the Senate. It will be seen from them that the question is raised upon the action of a body admitted on all hands to have been a constitutionally

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organized Legislature of the State of Rhode Island, declaring "null and void, and of no effect," an important act of a preceding body claiming to be the Legislature of that State, but the organization of which was peculiar, and the constitutionality and legality of whose acts are questioned.

The Senate, by the constitution, is made "the judge of the elections, returns, and qualifications of its own members;" and can it, under this power, look into these facts to determine which of the persons claiming the seat as a Senator from Rhode Island is entitled to represent that State in this body?

No question appears to the undersigned to be raised as to the "returns" or "qualifications" of either of the claimants, and he therefore considers that the question of "election" is the only one presented for decision. This question the Senate has the power to determine, because it is made "the judge of the elections" of its own members. The facts in this case show that the Legislature of the State of Rhode Island declare, in the solemn form of a law of the State, that Mr. Robbins has not been elected to the Senate; that the proceedings from which his commission proceeded were "null and void, and of no effect," because the body taking them were not authorized to elect a Senator; and that the place was "vacant" at the time when this declaration was made. Still, notwithstanding this solemn declaration by a body conceded to be the Legislature of the State, Mr. Robbins produces to the Senate, and there is referred to the committee, a commission in due form, according to the laws and the practice of the Government of Rhode Island, to show that Mr. Robbins has been duly elected a Senator to represent that State in the Senate of the United States. Will the Senate look behind this commission to determine whether or not it was properly granted? The undersigned believes that it is not only the right, but the duty of the Senate to do so. The commission is only the evidence of the election of a Senator; and, if the Senate were to limit its inquiries to the proper form and authentication of the commission, it would only make itself the judge of the evidence of an election, not the judge of the election itself. The undersigned supposes that the evidence of an election to an office is, in all cases, *prima facie* only, and is susceptible of being controverted and contradicted before a tribunal competent to judge of the election; he therefore supposes that the regularity of the evidence of an election may be one thing, and that the election may be a very different thing; and he concludes that as the Senate is constituted, not the judge of the evidence of the elections of its members only, but "the judge of the elections" of its members, it may, and, in all cases of a contested election, where the contest does not arise as to the regularity of the evidence simply, should look behind the evidence, and into the election itself,

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that it may determine, what it is constituted the judge to determine, the fact of election, or, in other words, that it may determine whether the *prima facie* evidence laid before it is the real evidence of facts, or is subject to contradiction by the facts.

The terms of the constitution would seem to confirm this construction of the powers of the Senate. It is "the judge of the elections, returns, and qualifications of its own members." The "returns" must refer to the commissions, or other evidences of election of the members of this body, as separate from the "elections" or "qualifications," and of the "returns" the Senate is the judge. Again, the "qualifications" must relate to the age, citizenship, residence, and other personal qualifications of the person elected, and of these "qualifications" the Senate is also the judge, and these are matters to be determined separate from the "elections" and "returns." So, also, the Senate is the judge of the "elections" of its members, as separate from the "returns and qualifications." The three enumerations would seem to be separate subjects, upon each of which the Senate is to judge in the performance of its constitutional duty; and as a judgment upon the returns is made a separate matter from a judgment upon the election, the inference would seem to be irresistible, that an examination behind the returns was contemplated; that a judgment upon the election, independent of the return, might be formed.

Against this construction of the constitutional powers and duties of the Senate, the majority of the committee interpose objections which are of a consequential character mostly, but which will be considered. The committee say, "it would be a dangerous exertion of power to look behind the commission for defects in the component parts of the Legislature, or into the peculiar organization of the body for reasons to justify the Senate in declaring its acts absolutely null and void. Such a power, if carried to its legitimate extent, would subject the entire scope of State legislation to be overruled by our decision, and even the right of suffrage of individual members of the Legislature, whose elections were contested, might be set aside." It would also lead to investigation into the motives of members in casting their votes, for the purpose of establishing a charge of bribery or corruption in particular cases."

Reserving, for the present, the consideration of the extent to which the consequences of adjudging any act unconstitutional, or illegal, or invalid, may be properly used as an argument against such an adjudication, the undersigned respectfully suggests that, in his judgment, the consequences here mentioned do not necessarily follow the decision apprehended. He understands it to be a necessary rule of all legislative bodies empowered to judge of "elections, returns, and qualifications" of their own members, that the person

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presenting the *prima facie* evidence of membership is allowed to take his seat, and is fully authorized to act until such *prima facie* evidence of right is overruled by the judgment of the body; and he never heard it doubted or questioned that the votes of a member, so sitting, were as valid for all purposes as the votes of a member whose seat was not contested, and whose right to a seat was not questioned. Indeed, if it were not so, the admission of a member to a seat in a legislative body until his election, return, and qualifications had been definitively adjudged, would be an absurdity. It would be the admission into the body of a voter who might, by the adjudication of the body itself, vitiate its whole proceedings.

So, also, in the case supposed by the majority of the committee of alleged bribery and corruption. The undersigned has always supposed that a member of a legislative body who should accept a bribe was punishable for the crime; but he has never understood, nor does he now understand, that the vote of the member given under the corrupt influence vitiated the proceeding voted upon, or rendered either void or voidable, by legal adjudication, such proceeding. The member bribed is still constitutionally and legally a member of the body notwithstanding his corruption, and retains all his rights and all his powers as a member, until conviction for the crime ousts him from his seat.

Hence it is concluded that the consequences above enumerated cannot follow the decision involved in the present controversy, whatever that decision may be, as the question presented is not whether the persons who did act as the Governor and Senate of Rhode Island, or some other persons claiming the right so to act, were the proper persons to discharge the duties of those offices; but the question is, were the persons who did so act, constitutionally and legally, even by any *prima facie* claim, the Governor and Senate of that State, and, as such, authorized to vote upon the election of a Senator?

Again, the majority of the committee say, "such a power does not belong to the Federal Government, and would, if claimed and carried out to its full extent, annihilate all the reserved rights of the States. It is a general principle of national law, applicable to all distinct and independent Governments, that if there arise any disputes in a State on the fundamental laws and administration, or on the prerogatives of the different powers of which it is composed, it is the business of the State alone to judge and determine them in conformity to its political constitution. No Government has a right to intrude into the domestic affairs of another State, and attempt to influence its deliberations, or to control its action."

These principles may be perfectly sound when applied to nations wholly disconnected with, and independent of, each other; but the undersigned respectfully submits that they



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cannot be applicable to Governments related to, and connected with, each other, as are the Governments of the States of this confederacy and the Federal Government, of which the States are component parts, and especially when the question is the proper representation of the State in that branch of the Federal Legislature where its sovereignty is represented in the particular manner pointed out by the federal constitution. Upon such a question, that instrument, and not the general principles of international law, must govern the decision. We have already seen that the constitution makes it the duty of the Senate to judge of the "elections" of its members. Another provision of that instrument says, "the Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof;" and the question now directly presented is, was Mr. Robbins chosen by the Legislature of the State of Rhode Island? It would seem to the undersigned, with all deference to the opinion expressed by the majority of the committee, that the Senate cannot judge of the election of that individual, unless it can look into and decide this question, and that to determine this to be an unauthorized interference, on the part of the Federal Government, in the domestic affairs of the Government of the State of Rhode Island, would be to determine that the Senate cannot, in the most important point always involved, "judge of the elections" of its own members; that it cannot judge whether or not they were chosen by the Legislatures of the States, when the constitution expressly requires that they should be so chosen.

In this connexion, the majority of the committee seem to place much stress upon another argument, entirely consequential in its character, which is, that a decision by the Senate, that the body of men who elected Mr. Robbins was not the Legislature of Rhode Island, will be, in effect, a decision that all the laws passed by that body, acting as the Legislature of that State, and all its other acts performed in that capacity, are null and void. Inasmuch as the State has now, and has had since the first Wednesday in May, 1833, a Legislature admitted on all hands to be constitutionally chosen and organized, it would appear to the undersigned that the majority of the committee give an unnecessary importance to this consequence of such a decision in case the consequence must follow; because the evils apprehended, to a very great extent, if not to the entire extent, might be remedied by the action of the competent Legislature in affirmance of the acts to be affected. But, however this may be, he cannot but consider it a plain proposition, and not requiring argument to support it, that when the constitutional organization of a body of men claiming to be the Legislature of a State is the question in issue, the acts of that body whose constitutional powers are disputed, are not to be adduced as evidence of the constitutional power of the body to perform them. When the constitu-



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tionality of a legislative act is questioned, he cannot believe that the act itself is to be relied upon as evidence of its own validity. Equally clear is it to his mind that when such a question is to be determined, the consequences of pronouncing the act invalid are not considerations which should legitimately control the decision. The act is either constitutional or unconstitutional. If constitutional, the dispute is settled; if unconstitutional, no consequences to follow from a pronouncement of the fact can make it valid. So with the body claiming to be the Legislature of a State. If the Legislature of the State, according to the provisions of its constitution, the controversy is at an end; if not the Legislature of the State, no acts of theirs in their assumed character, and no consequences to follow from the invalidity of those acts, can give them the powers which they had not when the acts were performed, or make them, what they were not, the Legislature of the State. But if consequences can be legitimately considered in the argument, the undersigned feels compelled to say that to his mind a decision that the State of Rhode Island has no fundamental law or constitution of government but the will of its Legislature, will be a consequence to its people much more serious than any which can be apprehended from pronouncing void the acts of the body of men assuming to be the Legislature of the State from May, 1832, to May, 1833.

The undersigned then concludes that the charter of Charles II, granted to the colony of Rhode Island and the Providence Plantations, (now the State of Rhode Island,) in the year 1663, and submitted to and adopted by the people of the colony in the year 1663 and '4, is now to be considered the fundamental law of the State of Rhode Island, and binding upon its Legislature as a constitution of government, except so far as the provisions of that charter were rendered obsolete by the American revolution; that that charter does fix, and specifically limit, the official terms of the Governor, Lieutenant Governor, and Senators of the State to one year; that the Legislature of the State have not the power to extend those official terms beyond that limit; and that the Senate, upon a question as to the election of a Senator, has the right to inquire whether he was chosen by the Legislature of his State, and, consequently, whether any body of men assuming to choose a Senator were authorized, as members of the Legislature of their State, to make the choice under the provisions of the constitution of such State.

It being conceded that the official terms of one year of the Governor, Lieutenant Governor, and Senators of Rhode Island, had expired in May, 1832, and that they continued from that period until May, 1833, to act in those offices, respectively, without any new election by the people, the undersigned is compelled to conclude that they acted during that period without constitutional authority, and that they

were not, after May, 1832, members of the Legislature of that State, and were not, therefore, in January, 1833, when they did so act, empowered to vote in the choice of a Senator to represent that State in the Senate of the United States. And, inasmuch as the constitution requires either a Governor or Lieutenant Governor, and at least six Senators, to constitute, with the House of Representatives, a Legislature, and as there were no such officers in constitutional existence in the State of Rhode Island in January, 1833, when Mr. Robbins purports to have been chosen a Senator, he is brought to the further conclusion that that choice was not made by the Legislature of the State.

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Has, then, Mr. Potter been validly elected a Senator from that State? That the body by which he was chosen was the Legislature of the State, has not been questioned; but, in speaking upon that point, the majority of the committee express the opinion that that Legislature had no "authority to proceed to the election of another Senator until the seat of the Senator elect had been vacated by a solemn decision of the Senate of the United States." If, speaking legally and constitutionally, there was a Senator elect, then this opinion is unquestionably sound, as it will not be contended that any Legislature of a State has the power to vacate a seat in the Senate. To be more explicit and intelligible: if Mr. Robbins's election was *voidable* only, and not *void*, a subsequent Legislature could not act until the vacancy was produced by the decision of the Senate. But if, as the undersigned has expressed his opinion, the election of Mr. Robbins was not made by the Legislature of the State, then it was not *voidable*, but *absolutely void*; it was not an election within the requirement of the constitution of the United States, and the vacancy existed from the expiration of his former term in March, 1833. If the Senate shall come to this conclusion, then the undersigned is not aware of any ground upon which it can be contended that any constitutionally organized Legislature of the State had not the power to fill that vacancy; or that the election of Mr. Potter, made by such a Legislature, in October, 1833, is not valid.

All which is respectfully submitted.

SILAS WRIGHT, JR.

Documents accompanying the report of the Minority of the Select Committee on the contested seat occupied by the Hon. Asher Robbins.

D.

*Statement by the Hon. Elisha R. Potter, dated December 11, 1833.*

I wish and expect to prove the following facts:

1. That the charter granted by Charles II of England to the colony of Rhode Island and Providence Plantations was

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submitted to the people of that colony, and adopted by them, in the year 1663 or 1664, as their constitution of government.

2. That, at the time of the American revolution, and since, this charter, so far as its provisions are applicable to the changed form of government, has been observed by the people of Rhode Island as their constitution.

3. That all the officers, civil and military, are sworn or "engaged" according to its direction, and the oath is in conformity with the requirements of the charter, and of the constitution of the United States.

4. That annual elections for Governor, Lieutenant Governor, Senators, or assistants, and certain other officers, and semi-annual elections for members of the popular branch of the Legislature, have continued to be held regularly since the adoption of the charter, and since the American revolution, as before.

5. That majorities of votes to constitute an election have always been required as directed by the charter, and that this principle still governs elections to office in Rhode Island.

6. That the State is now represented in the popular branch of the Legislature, as it has been since the adoption of the charter, according to the apportionment of representation among the several towns fixed in the charter itself, though that representation at this time, and for the last twenty years, has borne no just proportion to the actual population of the towns.

7. That the Governor, Lieutenant Governor, and Senators, or "assistants," together with certain other general officers, are elected by the whole State by general ticket; and that freemen, instead of assembling at one poll, and giving their votes for these officers as provided in, and contemplated by, the charter, vote in their respective towns, and send their votes, by a proxy, to the place of canvass.

8. That, to do this, every freeman deposits in the ballot box a written or printed ballot, with an endorsement of his full proper name upon the back of such ballot; that the name of the voter is entered upon a poll list when he deposits his ballot in the box; that, after the closing of the poll in each town, the box is opened by the officers having charge of the poll, the ballots found in the box are counted, and the endorsements upon the back of the ballots are compared with the poll list; that, being found to agree, the ballots are sealed up, and, together with a certified copy of the poll list, are sent to the place of canvass by one of the members of the Legislature of the town, while another certified copy of the poll list is filed with the town clerk of the town; that the votes given in all the towns, being thus returned to, and received at, the place of canvass, the whole are counted, and the endorsements upon the ballots compared with the certified copies of the poll lists sent with the votes for that purpose; that those

persons appearing, by this canvass, to have received a majority of all the votes given, are declared to be elected, and are sworn or "engaged" according to the charter and the laws of the State.

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9. That, from the year 1664 up to the year 1831, there had been no failure, at any time, to elect, by a majority of all the votes given, either a Governor or Lieutenant-Governor, and a number of Senators or "assistants" sufficient to form a quorum for business.

10. That, in any case of failure to elect any number of Senators or "assistants," no new election had ever been ordered to supply the vacancies thus remaining unfilled at the annual election, nor have those vacancies been filled in any other manner, but the Senators or assistants duly elected were sworn or "engaged," and constituted the Senate or body of assistants for the year, and that had been the uniform practice of the Government and people of Rhode Island from the time of the adoption of the charter up to the year 1831.

11. That, at the annual election on the third Wednesday in April, in the year 1831, a Governor, Lieutenant Governor, and eight out of the ten Senators or "assistants," were duly elected by a majority of all the votes given, and were sworn or "engaged" according to the charter and the laws, and the Government thus organized for the ensuing year, leaving the two places in the Senate or body of assistants vacant, without any further attempt to fill the same.

12. That, by the charter, by the laws of the State, and by the practice of the Government of Rhode Island for more than a century and a half, the officers above named were elected for the term of one year, to commence on the first Wednesday in May, 1831, and to end on the first Wednesday in May, 1832, and for no longer period, and that then their official powers derived from this election by the people would cease and determine, and their oaths of office cease to be binding and obligatory upon them.

13. That, on the first Wednesday of May, 1831, the Senate elected as before mentioned, and the popular branch of the Legislature of the State of Rhode Island, also elected at the annual election in April, 1831, and called and known by the appellation of the House of Representatives, met at the place appointed by law, took the oath of office or "engagement" required by the charter and the law, and thus constituted a Legislature competent to do business.

14. That these bodies, elected, constituted, and organized, continued to be the Legislature of the State of Rhode Island until October, 1831.

15. That, in August, 1831, the semi-annual election for a new House of Representatives took place according to the charter and the laws of the State, and that the new popular branch of the Legislature, thus elected, met at the place designated by law in the month of October, 1831, took their

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oath of office or "engagement" required, and thus, with the Senate or body of "assistants" elected at the annual election in April, 1831, constituted a new Legislature of the State, organized in conformity to the charter and the law, and to hold their offices and the legislative power of the State until the first Wednesday in May, 1832.

16. That this Legislature, at its regular meeting in January, 1832, apprehensive that three regularly organized political parties would be found to exist in the State at the then next annual election to take place in April, 1832, and that three sets of candidates would be run for the offices of Governor, Lieutenant Governor, Senators or "assistants," and other general officers, by reason of which no candidate would receive a majority of all the votes given for those offices, and, consequently, that no election would be made, passed a law entitled "An act in addition to an act entitled an act regulating the manner of admitting freemen, and directing the method of electing officers in this State," designed to meet the contingency, and to provide for the continuance of elections by the people, until an election should be made.

17. That the design and intent of the Legislature which passed this law, and of the members of that Legislature, was, in case of a failure of an election of these important State officers at the annual election in April, 1832, merely to provide for a new election or new elections, until those officers should be elected according to the charter or constitution, the laws and customs of the State, the Government, and the people of Rhode Island; and that the said law was not intended to have any other or further effect, except to secure these continued elections to the people until their choice should be legally and constitutionally ascertained, and that the Government should be continued until such choice should be made known.

18. That an annual election was held in April, 1832, at the time and in the manner prescribed by a permanent law of the State; and that, upon a canvass of the votes given at such annual election, it was ascertained that no election was made of either Governor, Lieutenant Governor, or any Senator or "assistant."

19. That on the first Wednesday of May, the time prescribed by law, the new House of Representatives, elected at the aforesaid annual election in April, 1832, met at the place prescribed by law, and took the oath of office, or "engagement," required by the charter and the law; and that no Governor, Lieutenant Governor, or Senators, having been elected, the former Governor, Lieutenant Governor, and Senators or assistants, appeared at the same place, as was supposed, in obedience to, and in conformity with, the provisions of the above recited law; when the House of Representatives, as directed by the said law to do, ordered a new election on the 16th day of May then next for the choice of



the general officers before named, and such others as were to be elected; when both bodies adjourned to meet again on the third Monday of June then next, without attempting any appointments of officers, civil or military; when, by the charter, the law, and the custom of the Government, the civil and military appointments for the whole State were to be made, and when they would undoubtedly have been made, if the Senate or body of "assistants" had considered itself competent to the performance of all the duties of a regularly elected Senate or body of "assistants."

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20. That, at the meeting of these bodies in June, 1832, and upon the canvass of the votes taken at the special election held on the 16th day of May past, it was found that no election had been made of either Governor, Lieutenant Governor, or any Senator or "assistant."

21. That the House of Representatives, as still directed by the law before recited, immediately ordered a further election for the said general officers to be held on the 18th day of July then next.

22. That, after this order was made, it was proposed that the two Houses should join in grand committee for the purpose of appointing sheriffs, it being asserted that, as the terms of office of the sheriffs had expired, and they had not been reappointed, their bail given for the former year would not be holden; and that, therefore, the reappointment of those officers had become necessary for the public safety. That the two bodies did join for that purpose, and did make an appointment of these officers, or assume to appoint them, together with a few justices of the peace, but that a proposition to go into the appointment of civil and military officers of the State generally was rejected; and the joint meeting of the two bodies was dissolved by the Governor, he declaring that the Houses had not joined for that purpose. That these two bodies then again adjourned to meet on the first Monday of August then next.

23. That at the meeting, pursuant to the last mentioned adjournment of these two bodies, to wit, the Senate or body of "assistants," whose terms of office, by election, had expired on the first Wednesday of May previous, and who had not been, after that period, re-elected, or resworn, or "engaged," for any further term, and the House of Representatives, regularly elected at the annual election in April, 1832, the votes taken at the special election held on the 18th day of July, 1832, were counted; when it was found that no election was yet made of either Governor, Lieutenant Governor, or any Senator or "assistant."

24. That, in consequence of its being a very busy season of the year, and that these bodies, thus constituted, had not attempted in May, and had refused in June, to go into a general appointment of the officers, civil and military, for the State, several members, to wit, seventeen members of the



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House of Representatives, did not attend the session, knowing from the public papers that no election had taken place, and believing, from the former action and practice of the two bodies, that nothing would be done but to order a new election in conformity with the direction of the law before cited. That, notwithstanding this reasonable expectation of these members of the popular branch of the Legislature of Rhode Island, and of the people of that State, after it was ascertained that no election had been made, and after a still further new election had been ordered to take place on the 28th day of August then instant, those bodies did, to wit, on the 8th day of the same month of August, 1832, proceed to meet in joint committee, and to appoint all the officers of the State, civil and military, which had not been appointed at their previous meeting in June.

25. That these appointments are, by the charter of Rhode Island, by its laws, and by the custom of its Government, to be made by the joint acts of the members of the Senate or body of "assistants," and of the House of Representatives; and that these appointments were, in fact, made by the joint action of a House of Representatives duly elected, and sworn or "engaged," and of a Senate or body of "assistants" whose terms of office had expired in May previous, and who had not been either re-elected or resworn, or "re-engaged," to discharge those duties, unless they derived the power to perform them by the law before recited, and without the consent of the people, or the obligations of the usual official oaths.

26. That, on the 28th day of August, 1832, the day appointed for the special election of general officers as before mentioned, the regular semi-annual election for a new House of Representatives was also held, and a new House of Representatives elected.

27. That this new House of Representatives assembled at the place, and on the day in the month of October, fixed by a general law of the State, and were sworn or "engaged," according to the charter and the laws of the State; and that the Senate or body of "assistants" before mentioned, and whose official terms had expired in May previous, met at the same time and place; when, upon counting the votes given at the August election, it was found that no choice of a Governor, Lieutenant Governor, or any "assistant" or Senator, had been made at that election; and the House of Representatives, as directed by the law before referred to, proceeded to order another election to be held on the 21st day of November then next.

28. That, after these proceedings had taken place, it was proposed that the House of Representatives, chosen and organized as last above stated, should join the Senate or body of "assistants," organized and holding their offices, if they were officers at all, as before mentioned, for the pur-

pose of choosing a Senator to represent the State of Rhode Island in the Senate of the United States for six years from the third day of March, 1833, in the place of the Hon. Asher Robbins, whose term of office would expire on that day; and that a motion was made in the said House of Representatives to that effect. That this motion was resisted and debated at length; when, upon a motion to postpone the further consideration of the subject until the session of that body to be held in January then next, the vote to postpone prevailed. That these bodies then adjourned to meet again in January, 1833.

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29. That the House of Representatives met in pursuance of this adjournment, and the Senate or body of "assistants," before mentioned, also met at the same time and place; when, upon counting the votes given at the November election, it was found that still no election of a Governor, Lieutenant Governor, or any Senator or "assistant," had been made.

30. That the canvass having been made, as last above mentioned, a resolution was offered in the House of Representatives in the following words:

"*Therefore resolved*, as the sense of this House, That, by reason of the provisions of the law for the next annual election, it has become, and is, unnecessary to order, at this session, any new election to be holden under the provisions of the act passed in January, A. D. 1832, entitled "An act in addition to an act regulating the manner of admitting free-men, and directing the method of electing officers in this State."

Which resolution, after debate, was passed by that body; and that no further election for a Governor, Lieutenant Governor, and Senators or "assistants," was ordered.

31. That, these proceedings having been had, a motion was again made in the House of Representatives to join in grand committee for the choice of a United States Senator. That this motion was resisted, twice postponed by a vote of the House, and finally passed; the yeas and nays having been ordered, and thirty-seven members having voted for, and thirty-two against it. That, in pursuance of this vote, the House of Representatives did join with a Senate or body of assistants, elected at the annual election in April, 1831, for one year, to commence on the first Wednesday of May thereafter, and to end on the first Wednesday of May, 1832, whose official terms, by virtue of that election, had expired in May, 1832, full eight months before this joint meeting; and who, at the time of the joint meeting, either held no offices at all, or held the places they then occupied by virtue of the law before referred to, and which law had been virtually repealed, abrogated, or wholly suspended, by the resolution of the House of Representatives last above recited, discontinuing the special elections directed by that law to be held for the choice of officers by the people to fill the places occupied by

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these Senators or "assistants." That these two bodies, having met, proceeded to the choice of a United States Senator; when, upon counting the ballots given, it was found that forty votes were necessary to a choice, and that Asher Robbins had received forty-one votes: whereupon, he was declared to be duly elected.

32. That these two bodies then separated; and, that, upon the meeting of the House of Representatives by itself, a solemn protest against the validity of the election of Mr. Robbins, made as before related, was presented to that body, signed by thirty of its members, and a motion was made that the protest, so offered, should be entered upon the journals of the House; and that this motion was refused, twenty-six of the members of the House present voting in favor of the motion, and twenty-nine against it.

33. That, after these proceedings, these two bodies adjourned to meet again on the Tuesday next preceding the first Wednesday in May, 1833, and not sooner, not having ordered any further new election to fill the offices of Governor, Lieutenant Governor, Senators or "assistants," or other general State officers.

34. That, by a general law of the State, the annual election for Governor, Lieutenant Governor, Senators or assistants, and all other general officers elective by the people, and also for the members of the House of Representatives, was to be held in April, 1833, and was so held. That the votes given for general officers at that election were counted by the new House of Representatives on the first Wednesday of May, 1833, as also provided by a general law of the State. That, upon counting those votes, it was found that a Governor, Lieutenant Governor, eight Senators or "assistants," and the other general officers, had been elected by the people, by having received a majority of all the votes given. That these new officers, thus elected by the people, were duly sworn or "engaged" on that day, and, together with the House of Representatives elected at the same time, constituted a Legislature according to the provisions of the charter and the laws of the State.

35. That at the said annual election in April, 1833, the Governor and seven of the Senators or "assistants," who were elected in April, 1831, and who had assumed to hold their offices from May, 1832, to May, 1833, by virtue of the law before referred to, were again candidates before the people for the same offices, and that all of them were rejected by a large majority of the votes of the people, and other persons elected to those offices.

36. That during the session of the new Legislature elected and sworn, or "engaged," as before related, a resolution was introduced, declaring the election of Mr. Robbins to the Senate of the United States, made in the manner before related, null and void, and no appointment to fill the vacancy occa-

sioned by the expiration of his term of office in March previous. That that resolution was considered and discussed in the House of Representatives of that Legislature, and was finally postponed until the October session of the Legislature of the State, before which October session the regular semi-annual election of another House of Representatives would take place, and that, among the other embarrassing questions of the State Government, could again come before the people.

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37. That in August, 1833, the regular semi-annual election of a House of Representatives was held, and an election made.

38. That in October, the time appointed by law for the assembling of that new House of Representatives, and at the place fixed by law, they did assemble, and were duly sworn, or "engaged," according to the charter and the laws of the State. That the Senate or body of "assistants" also met at the same time and place, that body being then composed of the persons regularly elected in April previous, for the term of one year, to commence in May, 1833, and to end in May, 1834.

39. That the Legislature of Rhode Island, thus duly organized, did take up the subject of the election of Mr. Robbins, and did then adopt and pass the declaratory preamble and law, a copy of which is now in the hands of the committee; thus expressing their sense that the vacancy occasioned by the expiration of Mr. Robbins's term in the Senate of the United States, in March, 1833, had not been filled; and that the action of the Legislature, or of those assuming to be a Legislature of the State of Rhode Island in January, 1833, was null and void, so far, at least, as related to the appointment of a Senator.

40. That the same Legislature, in October, 1833, and after having declared the so called appointment of Mr. Robbins void, proceeded to the appointment of a Senator to represent their State in the Senate of the United States for the term of six years from the third day of March, 1833, and that Elisha R. Potter received the appointment, having received a large majority of all the votes given in the joint meeting of the two Houses of the Legislature when convened for the purpose of making the appointment.

41. To establish the position that the people of Rhode Island have always considered the charter granted by Charles II, in 1663, as their constitution of government, and have so treated it, I wish further to prove that a convention of delegates from every town in the State, elected by the people in conformity with the provisions of a law previously passed for that purpose, was, upon one occasion, assembled to revise and new form the constitution of the State. That that convention did propose a constitution, which was submitted to the people of the State at their primary meetings at the polls, to be by them adopted or rejected as they should choose.

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That in consequence of the variance of this proposed constitution from many of the material provisions of the charter, and especially in consequence of its authorizing the Legislature to supply any vacancies in the elective offices of the State, which might exist by a failure of the people to elect by a majority of all the votes given, it was rejected, and the charter retained.

To establish the position that the Legislature of the State has never assumed to fill vacancies in the elective offices occasioned by a failure of the people to elect, I wish to prove that, so long ago as in the year 1806, there was a failure to elect a Governor by the people, no person having received a majority of all the votes given. That the subject was brought before the Legislature. That they did not attempt to continue the term of the then Governor, but that, when his official year expired, he left the office, and did not attempt further to do the duties. That a motion was made in the Legislature, that the person who had received the greatest number of votes at the election should be declared duly elected; and should be the Governor. That this motion was rejected by a large vote, and that during that year there was no Governor of the State in office, but that the Lieutenant Governor discharged the duties of Governor.

That repeated instances have existed during the existence of the Government, where failures to elect Senators have been experienced, and that those places have remained vacant for the year; no special election to fill them having ever been ordered till the year 1832, and no Legislature having ever assumed to fill them by original appointments, or by continuing the terms of the Senators in office beyond the year for which they were elected. Instances of this character have been experienced for the last two or three years. This was the case with the very Senate which was attempted to be continued in office by the law before referred to, and is the case with the present Senate of the State.

To establish the position that the State of Rhode Island has never suffered the appointment of a United States Senator, except by a Legislature elected with reference to such appointment, I wish to prove that James Burrill, jr., was formerly, and, as is believed, in the year 1817, appointed a Senator by the Legislature of that State at their regular session in June; that the validity of the appointment was questioned, inasmuch as it had been customary to make these appointments at the October session by a Senate elected in April previous, and a House of Representatives elected in August previous. That Mr. Burrill, having taken advice upon the subject, resigned the appointment thus conferred upon him in June, and again submitted his claims to the Legislature which was convened in October, when he was again appointed.

I wish, also, to prove that all the towns in Rhode Island now elect to the House of Representatives of that State ex-

actly the number of members appointed and allowed to the towns, respectively, by the charter. That such appointment is wholly out of proportion to the present population of the towns; and, to establish these points, I wish to prove what is the number of representatives each town sends, and the population of each town as ascertained by the last census.

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December 11, 1833.

E.

*Remarks on the several particulars of Mr. Potter's statement, with the necessary corrections thereof, and additions thereto, submitted by Asher Robbins.*

#### PARTICULARS.

No. 1. The charter of Charles II was adopted by the colony of Rhode Island as their colonial charter, and could not be otherwise adopted. The mode in which that adoption was signified is not material, as *that* could not make it more or less than the charter of the colony. Mr. Robbins's remarks.

No. 2. The charter has been regarded as fundamental only as to the grants made by it of particular privileges. In all other respects, from the beginning of the Government, the colonial and State Legislature has been in the practice of making all laws required by the exigency of their situation, and which were recommended by public expediency. Thus the charter requires the annual elections of general officers to be held in Newport; but, when this became inconvenient, the Legislature directed those elections to be held in the several towns.—See the act of the General Assembly passed at the August session, 1760, herewith communicated, and according to which those elections have since been held.

Again, by the charter, all the legislative power was vested in one body. But this being considered inexpedient, the Legislature was constituted into two bodies, each armed with a negative upon the other.—See the act of the General Assembly passed so early as March, 1666; according to which act the legislative power has been divided, and has been exercised down to this day.

Many other analogous instances might be cited, such as the act investing a Senator, in certain cases, with the powers of Governor; the act authorizing the Governor, in certain contingencies, to appoint times and places for the meeting of the General Assembly, which, by the charter, could only be done by act of the General Assembly; the act continuing in office sheriffs and justices (not re-elected) one week beyond the term of their appointment, and who, let it be noted, never take a second oath, though thus continued; and this



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formula of adjournment which takes place at the end of every May session held in May—"voted and resolved that all officers not re-elected, and to whose places others have been appointed, except justices of the peace who have not made their returns according to law, be, and they are hereby, continued in their respective offices until the next session of the General Assembly, with as full power and authority as they have at any time had." And be it here also noted, that these officers, though thus continued, never take a second oath. For this formula of adjournment, see schedule of May session, 1833, of the General Assembly, herewith communicated; and for the three acts of the General Assembly last mentioned, see Digest of the Laws of Rhode Island, 1822, page 99.

Indeed, the charter itself contemplates a departure from its literal requirements by the colonial Legislature; for the General Assembly is expressly authorized by the charter, "from time to time to make, ordain, constitute, or repeal, such laws, statutes, orders and ordinances, forms and ceremonies of government and magistracy, *as to them shall seem meet for the good and welfare of said company*; with this single restriction: "so as such laws, ordinances, and constitutions so made, be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England."—See Charter, at 7th page of Digest of State Laws, 1822.

The General Assembly is authorized by charter, also, "to regulate and order the way and manner of all elections to office and places of trust."—See charter, at page 8, Digest, 1822. And, again, "to direct, rule, order, and dispose of all other matters and things," subject only to the abovementioned restriction.

No. 3. It is true, as here stated, that all the officers, civil and military, are qualified by taking the oaths as prescribed by law.

No. 4. It is true, as stated in this paragraph, that one branch of the Legislature, viz. the Senate, is elected annually; and that the other branch, viz. the House of Representatives, is elected semi-annually.

No. 5. This statement, I presume, is in the main correct. It is supposed by some, however, that elections by pluralities were at one time authorized.

No. 6. It is true that the representatives of the State Legislature are proportioned among the several towns according to the provisions of the charter. This apportionment is considered one of the particular privileges granted by the charter, and therefore as fundamental, and not to be altered but by the people themselves in convention assembled for that purpose.

No. 7. Here is an admission that the Legislature has departed from the literal requirements of the charter. That departure took place by the statute of August, 1760, before

referred to ; and, yet here is no question made as to the competency of the Legislature to pass this statute.

No. 8. This is only a detail of the method of conducting elections as required by the statute of August, 1760, and other acts of the General Assembly of Rhode Island. And yet the statute of 1760 was not in conformity to the mode of electing prescribed by the charter, but was passed because public convenience required it to be passed.

No. 9. This statement is, I presume, in the main correct, at least as to the number of assistants or Senators sufficient to form a quorum having been annually elected. And it was, *therefore*, that no law had before been made to provide for the case of the failure of an election by a majority, not because the Legislature had not the power to make such a law. As soon as the necessity for it was perceived, the law was made, and with the unanimous concurrence of the three parties then in the General Assembly. Mr. Potter himself advised it as being necessary. He was a member of the committee which reported the bill ; moved to dispense with the rule of the House which required its reading on two separate days ; stated that it had the unanimous concurrence of the committee, and moved himself the passage of the bill for which he and every other member present of that House then voted. The bill afterwards received the unanimous concurrence of the Senate. This law is declaratory of the true intent and meaning of the provision in the charter before referred, (No. 12,) providing at the same time for the people repeated elections, which, without this law, they could not have by the standing election law of the State.

No. 10. Because it was unnecessary—a quorum being elected, there was a Senate elected. It was unnecessary to fill up the places of such candidates as had not been elected.

No. 11. There being a Senate elected, it was not necessary to fill up the two vacancies mentioned.

No. 12. The charter requires the election to be held at Newport by the freemen assembled there, in person. The election there was to be kept open and continued till there was a choice by a majority. But, by the charter, the annual officers of the preceding year were to hold over their offices and their power till an election was effected. And the usage of the company was in conformity to this idea : the Governor and assistants presiding in the election, be the time more or less, till a choice was effected. The provision of the charter is in the words following : “ And immediately upon and after such election or elections made of such Governor, Deputy Governor, assistant or assistants, or any other officer of the said company, in manner and form aforesaid, the authority, office, and power before given to the former Governor, Deputy Governor, and other officer and officers so removed, in whose stead and place new shall be chosen, shall, as to him and them, and every of them re-

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spectively, cease and determine."—See Charter, page 9, Digest, 1822.

By the charter the powers of the officers referred to are to cease and determine, not upon the termination of the year, as here stated, but upon a new election to the same places. Their oaths of course continued while their appointment continued.—See the provision of the charter as above recited.

Nos. 13, 14, 15. The proceedings were, I presume, as therein stated, such being the ordinary course of proceedings.

No. 16. It is admitted here that the law referred to, and now complained of, had become necessary, and was enacted by a competent Legislature.

No. 17. The design here imputed to the Legislature in making the law in question, and now complained of, is altogether a gratuitous assumption. Nothing of the kind appears on the face of the law to give the least color to the imputation. On the contrary, the law declares the officers referred to continued in the given contingency, and imposed no restrictions whatever upon their powers.

No. 18. An election by the people failed—an event which was apprehended, and for which the law in question provided.

Nos. 19, 20, 21, 22, 23, 24, 25. There are two annual sessions of the General Assembly by the law of Rhode Island, one called the May, and the other the October session.

But then each session adjourns that session to such other time as its own convenience dictates. At the May session, or at its adjournment, the Legislature usually makes all the appointments; executive, judicial, and military, for the year; but then its power of appointment is the same throughout the year.

In the year now in question, the Legislature made all these appointments—some at the *May session* adjourned to June, and the residue at the May session adjourned from June to August; and this after the House of Representatives had ordered further trials for the election of general officers in conformity to the law of January, 1832.

It is denied that the power of the Legislature then in being to make these appointments, either at the May session, or at its adjournments in June or August, was ever questioned by any member of the General Assembly, with the single exception, perhaps, of a member from Bristol, Mr. James D'Wolf. On the contrary, it was expressly admitted in debate at the June session, by Mr. Potter himself. Mr. Potter, in reply to Mr. Pratt, remarked, "*that he did not doubt the power of the Legislature to proceed on the election, but he considered it improper, unjust, and inexpedient.*" If the present Senate elect the officers, the new Senate, should one be appointed, will be deprived of a part of its legal and constitutional authority." See reported debate of the June session, published July 2, 1832. Mr. C.

Allen, also, of North Kingston, another leading member of the same political sentiments with Mr. Potter, in the same debate, said "*he did not understand the gentleman from South Kingston (Mr. P.) to doubt the power of the House, but only to question the expediency at the present time.*" If it were necessary to appoint the officers to keep up the Government, he thought it had better be done, but not otherwise. There was soon to be an election of Representatives, (I mean, said Mr. Allen, Senators,) who ought to have a voice in electing the officers. If we elect the officers now, there will be no necessity of ordering an election of Governor and Senators, as the chief part of their duty will have been taken from them."—See same debate, published July 2, 1832.

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Some stress seems to be laid upon this circumstance, viz. that the general officers thus continued had not been resworn. Now, this ought not to have been done, and is never done, for it would be a second engagement or qualification under the same appointment. Not one instance can be shown of its ever having been done, though instances are frequent of annual officers continued over the year, and of executing their offices under the original appointment. Such instances are frequent in Rhode Island, as has been stated above. On a re-election an officer is resworn, but never is he resworn under the same appointment.

It seems to be queried only whether all these appointments, executive, judicial, and military, thus made by that Legislature for that year, were not void: If this were meant to be contended, why was it not distinctly averred? If this were not meant to be contended, why was it brought forward at all? I presume it is stated by way of query only, because the Supreme Court of Rhode Island have affirmed the validity of the law in question, the competency of the Legislature in question, and consequently the competency of all those appointments—so palpably competent that they deemed it improper to permit that competency to be made a question. Indeed, they had virtually decided the same thing before by accepting their commissions, and executing their duties under them.—See authenticated transcript of the judgment of said court, rendered in the case of Amos Miner, on the 25th day of November, A. D. 1833, herewith communicated.

Nos. 26, 27, 28, 29. The proceedings detailed in these paragraphs were, I presume, as stated.

No. 30. The resolution here mentioned passed unanimously; all the three parties then in the House of Representatives concurring in it to a man. Mr. Potter himself was a member of that House and present; and, if he did not vote for the resolution, he did not in any manner oppose it.

No. 31. On the fourth day of the January session, 1833, (Thursday, January 17,) being the adjournment of the Oc-



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tober session, 1832, Mr. Tillinghast, of Providence, moved that the two Houses unite in grand committee for the purpose of electing a United States Senator. Mr. Potter hoped that it might be postponed until the following morning, when, if his feeble health would allow, he would express his views on the subject. To this request Mr. Tillinghast assented. On Friday morning, January 18, Mr. Tillinghast renewed his motion that the two Houses unite for the purpose before mentioned; and, after debate, on motion of Mr. Cross, of Westerly, the subject was further postponed to Saturday, January 19. On Saturday morning, January 19, Mr. Tillinghast again renewed his same motion, that the two Houses unite, &c.; when, after some discussion between Mr. D'Wolf and the mover, Mr. Potter said "that, as many gentlemen were solicitous that this appointment should be made at this session, he moved that the House would now resolve that when they adjourn at noon, they will adjourn to three o'clock on Monday, and that at three o'clock on Tuesday the two Houses would join in grand committee, and proceed to elect a Senator. If gentlemen would indulge in this, he would then withdraw all opposition, and would advise his friends to do so." This proposition was resisted; and, after debate, the question being taken on Mr. Tillinghast's proposition, it was carried: Yeas 37, Nays 32.

The two Houses then united in grand committee, for the purpose of electing a United States Senator from the fourth day of March, 1833. Mr. Tillinghast nominated Asher Robbins, Mr. C. Allen nominated Elisha R. Potter, Mr. B. Low nominated Dutee J. Pearce. The ballots were then distributed, and each member of the grand committee then present, Mr. Potter included, put in a ballot: the votes were then counted at the chairman's table, and it appeared that Asher Robbins had received forty-one votes, Elisha R. Potter twenty-five, and Dutee J. Pearce twelve; majority for A. Robbins, four. It was then declared that Asher Robbins was elected a Senator from the State of Rhode Island for six years from the fourth day of March, 1833, and the two Houses then separated. For the above facts, see reported proceedings of the General Assembly, published Monday, January 21, 1833, and the schedule of that session of the Assembly, heretofore communicated. It thus appears that the three parties then in the House went together into grand committee to elect a Senator, without any formal or informal objection to its competency; that three candidates were nominated by the respective parties, Mr. Potter being one of them; that every member then present, Mr. Potter included, put in a ballot; that the ballots having been counted, Mr. Robbins was regularly declared to be elected by a majority of four.

In the grand committee not a word was said by any one in objection to the grand committee's proceeding to a choice, nor to its competency to make a choice, nor for several days

after the election was completed, and the grand committee had been dissolved.

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In this article of Mr. Potter's statement, it is said that, by the resolution or order of the House of Representatives, referred to in No. 30, the law of January, 1832, became "virtually repealed, abrogated, or wholly suspended." That resolution was unanimously adopted, as before mentioned. It was the sense of all the Representatives, that another trial to elect, under the law in question, was unnecessary. There was to be no other session of the General Assembly until the annual session in May following, an election to which was provided by the charter and standing law of the State. It would have been idle and preposterous, therefore, to have ordered a special election, when there was to be no session of the Legislature before the annual May session in May following, an election to which was already provided for in the manner before stated.

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The law of January, 1832, in its first section, contains the provision that the elections provided by that law shall be ordered by the House of Representatives as often as the Assembly shall meet, whether by adjournment or otherwise, until a Governor, &c. be elected, "*or until such proceeding shall become unnecessary by reason of the provision of law for the next annual election.*" The law, therefore, vests clearly in the House of Representatives the discretionary power to dispense with such elections, if, in the judgment of its members, such trials have become unnecessary by reason of the near approach of the annual election provided for by law. The House accordingly *did* exercise its discretion, and decided *unanimously* that, for the reason set forth in the statute, it was unnecessary to order at that time any further election.

The provision of this law also, as to ordering further elections, was merely *directory to the House of Representatives*, in which the Governor and Senate had no participation. Yet it is to be contended, it seems, that this House misinterpreted its duty under this law, and that this alleged misinterpretation annihilated at once all the functions of the Governor and Senate, all their capacity, and even their very being as a Governor and Senate; and that, from *that* moment, they ceased, politically, to exist.

The order of the House of Representatives referred to by Mr. P. passed early in the first week of the session—as early, certainly, as Thursday, January 17, '33; and yet this Governor and Senate, so summarily disposed of, continued in the exercise of their ordinary legislative functions after the passage of that order, for the remainder of the session, and participated with the House in the passage of many important acts, public and private; all of which are deemed to be valid, and at this moment are in full force and operation in Rhode Island as the laws of the State. Among these may be mentioned

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"An act in relation to extra-judicial oaths," "An act in amendment of an act entitled 'An act relative to the election of Senators and Representatives to represent this State in the Congress of the United States, and of electors for the election of a President and Vice President of the United States,'" and "An act regulating criminal process in certain cases." The act in relation to the election of Representatives to Congress, &c. is especially worthy of notice, as having introduced into our State, in the choice of these officers, the highly important principle of *election by a plurality*. Instead of requiring, as formerly, a majority of the legal votes of the whole number of electors voting in the election to effect a choice, it provides that, in case of a failure to elect by such majority on the second and subsequent trials, a *plurality* of the legal votes shall be sufficient to elect. This important statute, thus passed by what is now assumed to be an incompetent Legislature, is the undisputed existing law of the State, distinctly recognised by the present Legislature, which, in ordering a second election for a Representative to Congress on the 20th of November ultimo, directed that it should be conducted according to law and the provisions of said act.

Let it be further noted that this same Governor and Senate afterwards, at the annual May session, 1833, attended in their places, as it was their duty to do, and inducted the new Governor and Senate into office. If they were not in being and power as a Governor and Senate, they could not have done this, and the present Governor and Senate are an unauthorized and incompetent body, not being duly and legally qualified to act.

Again: The Legislature, at the adjourned session, June, 1833, passed an act repealing the law of January, 1832, which surely was affirming the existence of that law.

Again: The Supreme Court of Rhode Island have affirmed the continuance of that law, after the passage of the order of the House of Representatives complained of, in their judgment in the case of Miner, heretofore referred to—Miner having been tried and convicted at the March term, 1833, two months subsequent to the passage of that order.

No. 32. The protest mentioned in this paragraph was not offered in the grand committee, by which body the election of Senator had been made, but in the House of Representatives, and several days after the grand committee had been dissolved. When this objection was raised against receiving the protest, Mr. Potter replied to Mr. Tillinghast, "that it would have been absurd for them to protest before it was known who was elected, and when it might turn out that there would be no occasion to protest; and that it was a very *curious position*, that they were to protest before they knew against *whom* to protest." It was not received by the House of Representatives, because the

election had not been made in that body, and because it was indecorous in its language towards both branches of the Legislature. Several of the members who incautiously signed it joined in the refusal to receive it, otherwise it could not have been rejected.

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This protest was not followed up by any memorial to the Senate of the United States, and remonstrance against the election.

No. 33. The Legislature having completed the business of the October session, and its adjournment in the usual form.

No. 34. The new Governor and Senate were inducted into office by the Governor and Senate of the preceding year, as stated in remarks on No. 31.

No. 35. Two of the three parties in the State combining, made a majority, and they elected their candidates.

No. 36. The resolution referred to, "declaring Mr. Robbins's election null and void," was not introduced at the May session in May, but at its adjournment in June. It was introduced at the close of the session, and not debated at all; but was laid on the table, on motion.

It was preceded by another resolution on the same subject, introduced Thursday, June 27, by Mr. Titus, of Scituate, and received by the House, which resolution was in the words set forth in the certified copy herewith communicated. The mover afterwards moved for leave to withdraw this resolution, (Friday, June 28,) which leave was granted, and the resolution withdrawn.

This last resolution took the broad ground that the law of January, 1832, was void *ab initio*; but it seems that this ground was immediately abandoned by withdrawing the resolution, and the resolution first above named substituted, which assumed merely that the Legislature had proceeded in the election *prematurely*. After this, it was generally supposed by the people of the State that the attempt to vacate the seat would be abandoned, and would not be further prosecuted.

Nos. 37, 38. The proceedings were as here stated, except that it is denied that, by any law or the terms of the charter, the Senate or body of assistants were elected to serve from May, 1833, to May, 1834.

No. 39. The act professing to vacate Mr. Robbins's seat affirms the fact of there being a Legislature, and only assumes, as before stated, that the Legislature proceeded *prematurely* in the election of a Senator, when, in fact, they proceeded to the election at the very session at which it was required to be made by the standing law of the State. This pretended vacating act was formally protested against by twenty-five members.—See protest herewith communicated.

No. 40. Twenty-six members of the House of Representatives protested in the House against the two Houses

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joining in grand committee for the purpose of electing a Senator, and declared, in their protest, that they would not vote or act in said committee should it be convened for such a purpose. A motion was made in said House that said protest should be received and entered on the journals; which motion was overruled.

When the two Houses met in grand committee for the purpose aforesaid, twenty-seven members of the House, before the committee proceeded to business, offered their protest against the meeting thereof, and all the proceedings therein, as wholly illegal and void. They, at the same time, declared that they would not vote or act in said committee for the purpose of electing a Senator, and they did not so vote or act.

Mr. Potter was nominated as a candidate for a Senator to the United States Senate. No other person was nominated, and no ballots were distributed or counted. The Governor, as chairman of the committee, then put the question, whether Mr. E. R. Potter be elected a Senator in Congress from the fourth day of March, 1833? A certain number of voices responded in the affirmative; and the negative vote being then put, the members who had offered said protest refused to vote. Mr. Potter was then declared to be elected a Senator from Rhode Island in the Senate of the United States from the fourth day of March, 1833. A motion was made in grand committee, that the protest last mentioned be entered on its journals; which motion was overruled. The two Houses then separated.—See copies of protests, and reported proceedings of Assembly, herewith communicated.

No. 41. It is true that a State convention assembled in Rhode Island, in 1824, to form a constitution for the State, and that the plan recommended was rejected by the people. But it is not true that it was rejected for the reasons alleged in the statement of Mr. Potter.

That statement further says that, in 1806, there was a failure to elect a Governor, (the fact being, I believe, that both the Governor and Lieutenant Governor of the preceding year had deceased previous to the April election,) and that no new election was ordered. This was unnecessary in either case, as, in the absence of a Governor, the Lieutenant Governor acts as Governor; and, in the absence of both, the first Senator acts as Governor, and did on the occasion referred to, and by virtue of the election law of the State.

The Legislature could not fill vacancies in the Senate occasioned by the failure of an election by the people, without a law enabling them to do it; and when the vacancies alluded to occurred, there being no such law, the Legislature could not fill them. But the Legislature is competent to make such a law, as it is clearly involved in their power on the subject of elections. No new special elections were ordered, because there was no law authorizing special elec-



tions. Besides, it was unnecessary, there being a quorum of the Senate elected, and therefore an existing Senate.

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As to Mr. Burrill's case, he was elected when there was to be an intervening election of a House of Representatives between his election and the expiration of the incumbent Senator's term of service. But Mr. Burrill himself always contended that his election, notwithstanding that circumstance, was valid; and he was induced to resign, or to take another election, from respect to the doubts entertained by some of his friends. The question involved in this case, however, was never decided by any tribunal, and, therefore, can make no precedent of any kind.

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But where is the necessity, I would respectfully ask, of all this inquiry and proof, when the same Legislature which made the election to this Senate in January, 1833, exercised all the powers of legislation, passed numerous acts, both public and private, which are now the standing laws of the State, recognised as such by all the judiciary of the State, and by the present Legislature itself; when it made all appointments, civil and military, and which appointments were, and are, all recognised in that State as good and valid; and, especially, when the Supreme Court of the State has affirmed the competency of that Legislature, and validity of its appointments, the appointment of Senator being the only appointment which, at any time, and in the extraordinary manner before mentioned, has been drawn into question?

For the whole series of public and private acts of the Legislature of 1832-'3, and of their appointments to office of every officer of the State, I beg leave to refer to the certified schedules of the General Assembly in May, June, August, and October, 1832, and January, 1833, now in the hands of the chairman.

F.

*Mr. Potter's reply to Mr. Robbins.*

No. 1. I consider the answer in this case evasive, and not containing the admission called for, though it does not deny, but seeks to avoid the point. I therefore reassert this article, and desire to adduce the proof before the committee.

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reply.

No. 2. The answer to this article is argumentative only; nor am I aware that I shall wish to submit any proof of facts to the committee to establish the position I have taken. It is not my purpose here, nor do I suppose it proper, to introduce argument in papers merely, as I understand these communications to be designed to state and ascertain facts for the consideration of the committee and the Senate. I will therefore only say that I hope to show that the laws of the State referred to by Mr. Robbins, as well as other laws not referred to; the charter and the practice of the Government of Rhode Island, fully establish a doctrine precisely; and in



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all respects, contrary to that which he seems to draw from them in this answer.

No. 3. The answer is a full admission.

No. 4. Is the same.

No. 5. I consider this answer a full admission for all the purposes for which I wish to use the proposition; but I confess I do not know why it is couched in the conditional terms in which it appears. I am not aware that any exception to the principle has ever existed as to an election to any State office.

No. 6. This answer admits all of fact stated in the proposition, and the argument and inference connected with the admission are immaterial to my present purpose. This is not the place to answer them.

No. 7. This answer is an entire departure from the fact stated—to the argument and inference which Mr. Robbins draws from the fact. I suppose, however, the committee will hold the answer to be an admission of the fact, and my remark at No. 2 will show why I do not now answer the inference and argument.

No. 8. This answer is a full admission of all the facts stated. Again, I must refer to the remark at No. 2 to excuse me from a notice of the arguments indulged in.

No. 9. This answer admits my positions sufficiently for my purposes, and goes on to state several facts independent of those stated by me. The only one of these facts which I consider in any way material, or which the committee can desire me to answer, is, that the law referred to (commonly called, in Rhode Island, "the perpetuation act") received the sanction of both branches of the Legislature of Rhode Island, and went through all the forms of the law of the State duly passed.

No. 10. This answer is a full admission of my position, and of the facts stated by me, and a reference to the remark at No. 2 will excuse me from further reply.

No. 11. This answer is also a full admission of my statement.

No. 12. As the answer in this instance does not meet my statement, and either admit or deny it, the statement is re-affirmed. As, however, I do not apprehend that any dispute will arise as to the facts stated by me, but only as to the construction of those facts in their application to the organization of the Government of Rhode Island, I am not aware that I shall be required to adduce any proof before the committee to sustain my statement, other than what will be drawn from the indirect admissions of Mr. Robbins, and the laws and charter.

Mr. Robbins, in connexion with his answer, states some facts in a manner which seems to require my admission or denial; which I therefore reply to in their order.

*First.* I admit that the charter did prescribe that the an-

nual elections on the first Wednesday of May in each year, for the election of a Governor, Deputy Governor, and assistants, &c., should be held "at the town of Newport, or elsewhere, if urgent occasion do require."

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*Second.* I admit that the charter contemplated that the freemen should assemble in person at Newport to make these elections, unless "urgent occasion" should require their assembling at some other place or places.

*Third.* I cannot make any admission as to the keeping open and continuing those elections, as I do not know that they ever were kept open or continued beyond the day. The language of the charter is: "And, further, our will and pleasure is, and we do hereby, for us, our heirs, and successors, establish and ordain, that yearly, once in the year, forever hereafter, namely, *the aforesaid Wednesday in May*, and at the town of Newport, or elsewhere, if urgent occasion do require, the Governor, Deputy Governor, and assistants of the said company, and other officers of the said company, or such of them as the General Assembly shall think fit, shall be, in the said General Court or Assembly to be held from that day or time, newly chosen for the year ensuing, &c."

*Fourth.* I deny that "the annual officers of the preceding year were to hold over their offices and their powers till an election was effected."

*Fifth.* I cannot admit that "the usage of the company was in conformity to this idea," because I am not aware, nor do I believe, that there ever was any such usage, although I feel bound to say that I could not concede that a "usage of the company" in contravention of an important provision of the charter in favor of popular rights would be material if proved, and, therefore, that I answer this assertion of fact out of respect to the committee, holding it, as my opinion, wholly immaterial to the decision of any question which can arise between Mr. Robbins and myself.

*Sixth.* I do not know who presided at the elections when they were held at Newport, and at that place only in the whole State, and, therefore, I can make no admission as to this allegation. I have already answered as to the continuance of those elections, and if the old Governor and assistants presided, I know not the fact, nor the authority for the action; and if it was after the expiration of their respective terms of office, I can only say that I do not find the authority in the charter.

*Seventh.* I admit that the extract from the charter, as given in Mr. Robbins's answer, is a true extract from the charter or constitution of the State of Rhode Island; but I deny that the extract is sufficient to give to the committee its own meaning, without a more minute examination than they would be likely to give to this instrument. I therefore feel bound to say that this extract is a mere member of a sentence

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in the charter, that it neither begins nor closes the sentence to which it belongs, and that the previous part of the sentence is necessary to a right understanding of this paragraph, and, as I confidently think, will show that the whole extract relates to the filling of vacancies in the offices of Governor, Deputy Governor, or assistants, occasioned *by death, or removal from office for cause*, and not at all to vacancies occasioned by the expiration of the constitutional term of service. With this suggestion, the committee will discover the emphatic meaning of the terms "*office and officers so removed*," used in the extract.

*Eighth.* The whole of Mr. Robbins's second answer to my statement No. 12<sup>o</sup> is purely constructive, and I have only to say that I disagree totally with all his constructions here given, and refer to my former replies to other portions of this answer for the reasons of that difference of opinion. My remarks at No. 2 will show my reasons for not entering into the argument here.

Nos. 13, 14, 15. The answer to these statements is a full admission of my positions.

No. 16. This answer is the same.

No. 17. Mr. Robbins and myself are distinctly at issue as to the intent of the Legislature of Rhode Island in passing this law, called "the perpetuation act." I am not, however, aware that I shall desire to produce any proof under this head which I do not expect to derive from other portions of my statement, going to show the action of the various branches of the Government under the law for some months after the contemplated contingency happened.

No. 18. This answer is a full admission of my statement.

Nos. 19, 20, 21, 22, 23, 24, 25. Mr. Robbins's answer to my statements, thus numbered, is entire, and consists of five paragraphs, as copied and presented to me by the chairman of the committee. For the sake of perspicuity, I will reply to each paragraph of that answer separately, premising that the committee will assume that the answer of Mr. Robbins is an admission of the facts stated by me under these several divisions, in all cases where that answer does not deny those facts. Under this expectation, I reply—

Paragraph 1 and 2. These paragraphs contain nothing which I do not recognise as correct.

Paragraph 3. The only point in this paragraph which I can consider it proper to answer, is the point admitted by Mr. Robbins, that the power of this Legislature, constituted as it was, even to make the appointments of ordinary State officers, was questioned in that body, and at the time when they proposed to proceed to those appointments. The question to be determined by the committee and the Senate, is, what were the powers of that so called Legislature? And I cannot see the materiality of the allegation that their powers were or were not questioned by themselves; though the

fact that they were so questioned, admitted as it is by Mr. Robbins, is so far proper as to show that the questions raised here are not new either to the parties concerned before the committee, or to the people of the State of Rhode Island. Further than this, I have no answer to make to this paragraph, as I should certainly consider it improper for me to attempt to answer those allegations which relate to the expressions of individual members of the Legislature, whether those expressions were made officially or individually, or in or out of that body. Much less should I be willing to push upon the committee expressions or declarations of my own or my opponent as evidence of the proper construction of the constitution of our own State, or of our individual constitutional rights. And as this is the second instance in the answer of Mr. Robbins before me, in which expressions, said to be mine, are attempted to be introduced as testimony upon these grave questions of constitutional law and legislative power and fidelity, I hope the committee will indulge me in saying that I am willing my rights in the case before them, so far as they are personal, shall be tried by what I have myself uttered; but, in such a trial, I should desire that all I have said pertinent to the subject should be fairly and truly laid before the committee, and not that such phrases and sentences as those interested against me may choose to select, or put into my mouth, should stand for the proof. So far, however, as my rights in the question before the committee are representative, and not personal, I cannot compromise them by any consent of mine, and much less would I dare to place the constitutional rights of the people of my State upon the uncertain basis of the hasty or unguarded expressions of any man, and certainly not of my own. Under the *order* of the committee, I will try to lay before them the true state of individual opinion and expression in Rhode Island upon this subject; but, without such an order, neither my sense of self-respect, nor my duty to the State, would permit me to notice such descriptions of proof to establish constitutional rights and legislative duties.

Paragraph 4. No fact is brought in question by this paragraph, which will require the production of testimony before the committee on my part, so far as I at present understand the controversy. I have never doubted that the Legislature of my State could continue in office, either with or without a re-engagement, all those officers over whose appointments, terms of service, removal, and reappointment, they have, by the charter, full and unlimited control; and I *deny* that any other officers have been continued by the Legislature during the existence of the Government from 1663 to the present time, except the single instance of the Governor, Lieutenant Governor, and Senators, in the case in question. That law was the first attempt to continue, by legislative act, the terms of service of those officers who are elected by the people,

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1834. and whose official terms are limited by the charter. Mr.  
 23d Congress, Robbins speaks of "the same appointment," but he cannot  
 1st Session. intend to keep from the committee the fact that this Senate  
 Mr. Potter's was elected by the people for a single year, to end in May,  
 reply. 1832; and that, if they had any official life after that date, it  
 was derived from "the perpetuation act," and not from the  
 people; that it was an appointment by the Legislature, they  
 themselves constituting the highest branch, and not by the  
 people; and, therefore, that it was not the same appointment  
 made by the people for one year, to end in May, 1832, but  
 another appointment, wholly from another source, in dero-  
 gation of the rights of the people, to continue indefinitely,  
 dependent upon a contingency which might never happen.

Paragraph 5. No suggestion or "query" is made in my state-  
 ment in relation to the validity of the State appointments, other  
 than such as has arisen from the facts referred to in relation  
 to the constitution of the body which acted as a Legislature  
 for the State of Rhode Island from the first Wednesday in May,  
 1832, to the first Wednesday in May, 1833; and such as must  
 have arisen in the mind of Mr. Robbins, from a review of the pe-  
 culiarity and inconsistency of the constitution of the highest  
 branch of that body, when compared with the charter of Govern-  
 ment, and rights of the people of that State. If it be intended, by  
 the singular language of this answer to a statement of fact, to  
 cast before the committee an insinuation that I designed to sug-  
 gest as "a query," as to the regularity of those proceedings,  
 what I was unwilling directly to assert, I repel the insinuation as  
 unworthy of the subject which calls for these communications,  
 and of those whom the State of Rhode Island has made parties  
 to them. If the supreme or any other court of that State  
 has made a decision touching the merits of this controversy,  
 it shall receive the most respectful consideration from me,  
 and I hope it will have all the weight to which such an au-  
 thority should be entitled with the committee; but as I am  
 myself unacquainted with any such decision, and with the  
 case presented to the court upon which it is said to have  
 been made, it is impossible for me either to admit or deny  
 any thing in relation to it, or to express any opinion of its  
 applicability or force. I must, therefore, leave Mr. Robbins  
 to produce to the committee such proof, under this allegation,  
 as he may be able to furnish.

Nos. 26, 27, 28, 29. These paragraphs in my statement are  
 admitted by Mr. Robbins in an answer applying equally to  
 them all.

No. 30. I deny the allegation of Mr. Robbins in his answer  
 to this paragraph; and although I do not discover that the  
 assertion, or its opposite, can be material to the committee, I  
 state that the resolution formed the subject of debate, and  
 that, upon its passage, although the ayes and noes, I think,  
 were not called, I voted against the resolution, as did, I be-  
 lieve, many others. I shall produce to the committee such



evidence as the Journal of the House of Representatives furnishes upon this point.

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No. 31. The answer to this paragraph is very diffuse, and, without either admitting or denying, in terms, the statement of facts made by me, proceeds to restate those facts, intermixed with many others. I must, therefore, be fully authorized to consider it an admission of my statement, and will only proceed, as briefly as possible, to notice such of the additional facts stated by Mr. Robbins as I consider it proper or material to notice. Here, however, I must state that a reference to my reply to the third paragraph of Mr. Robbins's answer to Nos. 19, 20, 21, 22, 23, 24, 25, of my statement, will show the reason why I refrain wholly from any notice of those parts of this answer which refer to the individual opinions or expressions of myself or any other person. I must not be understood, by this silence, to admit those statements either of individual opinion or expression; for, so far as regards myself, they are not true representations of my conduct, and I refrain from making the corrections, merely because they would be tedious, and I believe the committee would hold them altogether immaterial. Should the committee otherwise order, they will be most cheerfully and promptly furnished. I must here also add, that Mr. Robbins, in his answer, refers, as is several times done in other parts of his communication, to what he terms "reported proceedings of the General Assembly, published Monday, January 21, 1833," of which I know nothing, as I am not aware of any "report" of those proceedings, other than in the newspapers, and I protest against a resort to them as proof before the committee as to either my individual expressions and action, or as to the proceedings of the Legislature of Rhode Island. These things being premised, and the inferences and deductions made by Mr. Robbins being considered as mere assertion, and not as proof, I believe the material statements in the two first paragraphs of this answer are correct.

It is not true, as stated in the next paragraph, that the resolution referred to was passed "unanimously" in the House of Representatives. My reply to No. 30 will exhibit my statement of the facts upon this point.

It is not true that "it was the sense of all the Representatives that another trial to elect, under the law in question, was unnecessary;" but it is true that a majority of the Representatives refused to order another special election under the law, that the people might have an opportunity to make another trial to elect.

Mr. Robbins states that "there was to be no other session of the General Assembly until the annual session in May following;" and this was true in January, 1833, when that body was in session, only because the majority willed that there should be no other session, not because they had not the power to hold as many sessions between that time and May as they pleased.

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reply.



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For proof that the General Assembly had this power, see Mr. Robbins's answer to No. 19, &c., where he says, "each session adjourns that session to such other time as its own convenience dictates." Mr. Robbins's inferences and deductions, therefore, based upon this assertion to excuse the omission to order a new election after November, fall to the ground. I, therefore, reassert that the resolution declaring that no further special elections should be ordered under the law providing for them, and positively directing them, "virtually repealed, abrogated, or wholly suspended" that law.

The two next paragraphs in this answer of Mr. Robbins state no fact, but contain mere matter of legal construction and argument, which I consider it improper for me to answer here. I will only add, therefore, as to them, that I differ entirely with him in his statement of the contents of the law in the constructions he puts upon it, and in the inferences he seems disposed to deduce from his statements and constructions.

In relation to the next paragraph of this answer, I deem it only necessary to say that the order suspending further special elections was passed before the action as to the appointment of a United States Senator at the time when Mr. Robbins was declared duly elected, and I admit that, notwithstanding this virtual repeal, abrogation, or total suspension of the law of January, 1832, the so called Governor, Lieutenant Governor, and Senators, did continue to act in their official capacities, claiming to hold their places by virtue of that very law. This is the ground of the complaint, and is believed to be sustainable, even if it be determined that the law, so far as those officers were concerned, ever had any validity. I cannot suppose it material to go into an examination of the acts which these officers, after that time, performed; but I presume the laws referred to were passed as stated. I observe, also, that Mr. Robbins's answer details very particularly a late law regulating the choice of Representatives in the Congress of the United States, and I presume the provisions of the law are correctly given, but I do not see the relevancy of these facts to the subject before the committee. It is not possible that a charter from the King of England, granted one hundred and twenty-six years before the adoption of the constitution of the United States, should have provided for the election of Representatives to a Congress formed and organized by, and in obedience to, that constitution. The Legislature of Rhode Island must therefore have full power to make laws as to the election of those officers, as nothing in the charter relates to such elections.

The statement in the next paragraph, that the Governor and Senate, thus holding under the law referred to, attended in their places in May, 1838, and "inducted the new Governor and Senate into office," is probably true as to some of

those individuals, and not true as to some of them; but the duty upon them to do this, or the necessity of their doing it, for the valid organization of the new Government, is denied. 1834.  
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1st Session. Indeed, the fact is, that they have nothing whatever to do in the organization of the Government under other officers duly elected, but often make themselves spectators of that ceremony. They are out of office, and have no official power whatever. Mr. Potter's  
reply.

The statement in the next paragraph, that this law of January, 1832, was repealed in June, 1833, is mistaken. That law was repealed as one of the first acts of the new Legislature in May, 1833; but the inference of Mr. Robbins, that the repeal of an unconstitutional law, for the reason actuating the repealing body that the law is unconstitutional, is affirming that law, cannot be admitted.

My reply to the fifth paragraph of Mr. Robbins's answer to No. 19, &c. of my statement, is referred to for all I can say in relation to an alleged decision of the Supreme Court of Rhode Island, here again quoted.

No. 32. It is true, as stated, that the protest was not offered in grand committee, because the grand committee were not together twenty minutes after the election was pronounced, and did not meet again during that session of the Legislature. It was also considered most proper for each House to act upon this subject by itself, and to express its own sense of the proceedings. In relation again to personal expressions put into my mouth, I shall abstain from all remark, for the reasons assigned on two former occasions. The allegation that the protest was not received by the House, is true, but *it is not true*, as stated by Mr. Robbins, that several of the members who signed it joined in the refusal to receive it. *No such member voted against its receipt.*

So far as the question of disrespect is raised in relation to the protest, I shall not enter into argument or controversy with Mr. Robbins upon that subject, but ask the committee to permit me to give in evidence before them a copy of the protest itself, properly certified, that the paper may speak for itself.

I am unable to say what stronger memorial or appeal to the Senate of the United States could have been made by the subsequent Legislature, by any of the persons interested, or by the people of Rhode Island, than the solemn declaration of that Legislature that the appointment of Mr. Robbins was wholly void, and the appointment of a Senator to fill the vacancy, and the furnishing that Senator with the ordinary credentials to entitle him to a seat in that body.

No. 33. The answer to this paragraph is considered a full admission of the facts stated.

No. 34. This answer is considered as a full admission of the facts stated in the paragraph, and my reply to the additional allegation, that "the new Governor and Senate were

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Mr. Potter's  
reply.

inducted into office by the Governor and Senate of the preceding year," will be found in my remarks in reply to No. 31.

No. 35. This answer is considered an admission of the facts stated by me ; and as to the additional allegation that two parties joined to elect the new general officers, I can only reply that these officers were elected because they received a majority of all the votes given for the offices respectively ; and that, as I suppose, they obtained a majority of all the votes, because a majority of the freemen of the State preferred them to the incumbents of those offices.

No. 36. In reply to this answer, I can say that I am unable to determine whether the resolution spoken of was introduced in May or June, but, for all the purposes for which I wish to make use of the fact, I am willing to admit that it was in June, the Legislature being then the same which met in May. My object was to show what I knew to be a fact, that the subject was brought before that Legislature, and, consequently, by the publication of the resolution before the people prior to the semi-annual election of a new House of Representatives in August, 1833. The postponement was a matter of universal consent, that the subject might go before the people ; and though no formal debate was had upon the resolution, a discussion was had merely designed to draw public attention to the question.

In reference to the two following paragraphs of the answer to this division of my statement, I have to say that I think the statement of facts to the word "prematurely," in the second of those paragraphs, is substantially correct. The last allegation in the second paragraph, to wit, "after this it was generally supposed by the people of the State that the attempt to vacate the seat would be abandoned, and would not be further prosecuted," is wholly mistaken. So far from this statement being true, I am able to assert, from personal knowledge, that the declaration was made in the Legislature when the resolution was offered, that it was done for the purpose of drawing the public attention to the subject, and that the appointment of Mr. Robbins would be reviewed, and never would be submitted to without the sanction of a Legislature elected with express reference to the question. I further know, and state the fact to be, that this question, more than any other, was agitated among the freemen of the State at the August election, and was the principal turning point of that election. This also was true of the election in April, 1833, when the new Governor and Senate were elected, and one of the principal causes of the great change of general officers at that election was this question.

Nos. 37 and 38. So far as the answers to these two paragraphs are an admission of the facts stated in them, it is full and sufficient ; and as to the *denial* that the general officers were elected to serve from May, 1833, to May, 1834, reference is made to the charter itself, and no fact remains

to be proved, the construction of that instrument alone being the decision of the issue.

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No. 39. The answer of this paragraph necessarily admits all the material facts stated by me to which it is an answer; and all the statements in the answer are inferences, arguments, and constructions of, and drawn from, the laws of the State, and particularly the act declaring the election of Mr. Robbins null and void. It was not to have been expected that Mr. Robbins and myself should have agreed as to the validity or proper effect of this law, else we should have been unable to apologize for the trouble we are giving to the committee and the Senate. It is not my purpose here to attempt an answer to these arguments, and all the laws in question will be, or are, before the committee, and will be open at a proper time for my arguments and the construction of the committee. The protest referred to, it would seem, is in proof before the committee already, and I am not aware that it requires any remark from me. Not having seen the copy thus produced in evidence, I am unable to remark upon it.

Mr. Potter's  
reply.

No. 40. The answer to this paragraph I believe to be, in all material respects, a true history of the proceedings referred to, and I have only to add, that the invariable custom of the Rhode Island Legislature has been, and is, when, in grand committee for the appointment of any officer, and but one candidate is nominated, not to ballot, but to take the sense of the committee upon that nomination by a *viva voce* vote.

A reference is made at the close of the answer to copies of protests which I have not seen, and therefore can neither admit nor deny; and also to what is termed "reported proceedings of Assembly," of which I know nothing, and against which I protest as evidence before the committee, unless reported and duly certified by the officers of that body.

No. 41. The admission as to the first paragraph in this answer is satisfactory. The denial makes an issue which must be decided by inference and argument, and is not susceptible of proof as a fact, the intention of the freemen in giving their votes against the proposed constitution not being now ascertainable.

As to the two next paragraphs of this answer, the admissions cover my object in making the points. The object was to show that the Legislature of Rhode Island, previous to January, 1832, had never attempted to fill vacancies in the offices of Governor, Lieutenant Governor, and Senators, occasioned by a failure of the people to elect, either by continuing the incumbents in office, or by original appointments. It only remains for me, therefore, to *deny* the inference drawn from the charter, that the Legislature have the power to pass such a law, which inference is connected with the answer.

In relation to Mr. Burwell's case, I believe the statement made by Mr. Robbins is substantially correct; and whether

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or not those facts have any bearing upon the present question, is a matter of argument from the facts.

The argumentative comments which close Mr. Robbins's answer are mere repetitions of what has been repeatedly referred to in the course of his particular answers, and therefore seem to require no further notice from me. Still I must not be understood to admit any of those inferences and arguments because I do not attempt to answer them in this place.

ELISHA R. POTTER.

WASHINGTON, *December 31, 1833.*

K.

*The proceeds of a Court of Commissioners at Newport, November 24, 1663.*

Reception of the letters patent. Att a very great meeting and assembly of the freemen of the collony of Providence Plantations, at Nuport, on Rhod Island, in New England, November 24, 1663.

The abov sayd Asembly, being legally called and orderly mett for the sollome reseption of his Majestyes gracious letters pattents unto them sent ; and having, in order thereto, chosen the President, Benedict Arnold, Moderator of the Asembly :

It was ordered and voted, *nemine contradicente* :

Voted 1. That Mr. John Clarke, the collony agent's letter to the President, asistants and freemen of the collony, be opened and read ; which accordingly was done, with good delivery and attention.

Voted 2. That the box in which the King's grations letters warr enclosed be opened, and the letters with the broad seale thereto affixed, be taken forth, and read by Captayne George Baxter in the audiance and vew of all the people ; which was accordingly done, and the sayd letters, with his Majestyes royall stampe and the broad seale, with much beseming gravity held up on high , and presented to the parfitt vew of the people, and soe returned into the box, and locked up by the Governor in order to the safe keeping it.

True copy of record. Witness :

HENRY BOWEN, *Secretary.*

First meeting of the General Assembly under the letters patent.

Att the General Asembly, sitting at Nuport, for the collony of Rhode Island and Providence Plantations, March 1st, 1663-'4, and in the sixteenth year of the reign of our sovreigne lord the King.

The General Assembly being mett, in obedience unto, and in order for the putting in actual practice accordingly those particulars contayned in the royal pattent granted to us by our sovraigne lord the King, Charles the Second, of Eng-

land, Holland, France, and Ireland, and Dominions and Territory thereunto belonging: this being in regard to the season of the year, the soonest time the Assembly could mett since the sayd pattent came, and finding that, by the care of the Governor, Deputy Governor, and Counsell engaged, that, in the first past interval, the Governement hath bene kept in such a form as hath bene correspondant to the sayd charter, and as necessary to the keeping good order, accordingly, in the collony thereunto: now, we being, by the same good hand of Providence and gracious favor of our lord the King, and by the care and call of the Governor and Counsell af or sayd, assembled together, and having seene and heard well considered the contense of the sayd most ample charter and grant, doe *unanimously* agree, conclud, and ordayne, that it be recorded in the fore front of our transactions, our humble thanks unto his most royall and gracious Majestie, our said sovraigne lord the King, and hereby desiring, ordering, and resolving, that it be recorded to and for *posterity*, that as, with loyall minds, we of the sayd collony, and *every free inhabitant or member thereof*, have made our humble addresses unto his sayd Majestye by our faithfull and most worthy agent, Mr. John Clarke, of Nuport above sayd, for the King's Majesties favor unto us, given forewith, the same loyall, humble, and sincear thanks: *we doe, for ourselves, and in name of all the members that are, or shall be admitted into this collony, company, and corporation*, as freemen of the same, declare and record our faithfull alligance, forever to be profosed and performed, unto his sayd Majesty, his heirs and successors, accordingly.

True copy of record. Witness:

HENRY BOWEN, *Secretary.*

By his Excellency John Brown Francis, Governor, captain general, and commander in chief of the State of Rhode Island and Providence Plantations:

Be it known that the name "Henry Bowen," to the aforewritten attestation subscribed, is the proper handwriting of Henry Bowen, Esquire, who, at the time of subscribing the same, was Secretary of the State aforesaid, duly elected and qualified according to law: wherefore, unto his said attestation full faith and credit are to be rendered.

In testimony whereof, I have hereunto set my hand, and caused the seal of said State to be affixed, at [L. s.] Providence, this twenty-third day of December, in the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

JOHN BROWN FRANCIS.

By his Excellency's command:

HENRY BOWEN, *Secretary.*

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Election law.

L.

At the General Assembly of the Governor and Company of the English colony of Rhode Island and Providence Plantations, August session, A. D. 1760.

*An act regulating the general election.*

Whereas it is found, by long experience, that the freemen going to Newport to put in their votes for general officers at the election, is very injurious to the interest and public weal of the colony, and occasions a very great loss of people's time, at a season of the year when their labor is absolutely necessary for preparing the ground and planting the seed on which the produce of the whole summer must depend; and as all the ends of voting for general officers may be as fully attained by the freemen's putting in their proxy votes at the term meeting in their own towns appointed by law for that purpose, agreeably to the ancient and laudable custom of most of the prudent freemen: Therefore,

*Be it enacted by the General Assembly, and by the authority thereof it is enacted;* That, for the future, every freeman who is disposed to give his suffrage for the election of general officers in this colony, shall do it by putting in a proxy vote in the town meeting in the town to which he belongs, on the third Wednesday in April next preceding the general election, agreeably to the law and well known custom of proxying; and no freemen shall be permitted to vote for general officers at the general election held at Newport on the first Wednesday in May, but only such as be members of the General Assembly.

*And be it further enacted by the authority aforesaid,* That no person in this colony, for the future, shall vote and act as a freeman, in any case whatsoever, but such only who at the time of voting shall be truly and really possessed of land or real estate, to be valued and determined according to the former laws, of the full value of forty pounds lawful money, or that will rent yearly for forty shillings lawful money, or the eldest son of such a freeman.

That every person newly admitted free of any town shall be admitted to put in his proxy vote for general officers in the town meeting at his own town; and such of them as shall be admitted freemen of the colony by the General Assembly, their proxies shall be received and numbered at the general election; and such as shall not be so admitted free by the Assembly, shall be rejected and thrown out.

True copy of record. Witness:

HENRY BOWEN, *Secretary.*

By his Excellency John Brown Francis, Governor, captain  
general, and commander in chief of the State of Rhode  
Island and Providence Plantations:

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Be it known that the name "Henry Bowen," to the afore-  
written attestation subscribed, is the proper handwriting of  
Henry Bowen, Esquire, who, at the time of subscribing the  
same, was Secretary of the State aforesaid, duly elected and  
qualified according to law: wherefore, unto his said attesta-  
tion full faith and credit are to be rendered.

Election law.

In testimony whereof, I have hereunto set my hand,  
and caused the seal of said State to be affixed, at  
[L.S.] Providence, this ninth day of December, in the  
year of our Lord one thousand eight hundred and  
thirty-three, and of independence the fifty-eighth.

JOHN BROWN FRANCIS.

By his Excellency's command:

HENRY BOWEN, *Secretary.*

M.

*State of Rhode Island and Providence Plantations, in Gene-  
ral Assembly, January session, A. D. 1832.*

An act in addition to an act entitled "An act, regulating the manner of ad-  
mitting freemen, and directing the method of electing officers in this State." Supplemental  
election law.

SEC. 1. *Be it enacted by the General Assembly, and by  
the authority thereof it is enacted,* That whenever, at the  
annual general election, it shall be found that no election of  
a Governor for the year then ensuing has been made by a  
majority of the freemen voting for general officers for such  
year, the House of Representatives shall thereupon, as soon  
as duly organized, order a new election for the choice of a  
Governor by the freemen of this State in their respective  
town meetings, to be holden in the same day throughout the  
State, not more than thirty, nor less than ten days from and  
after the day of such order, which town meeting shall be con-  
ducted, and the voting therein shall be regulated, in manner  
as is prescribed in the act to which this act is in addition;  
and the votes therein received for Governor shall be sealed  
up and delivered, as in said act prescribed, to a Senator or  
Representative of the town in which the same were received,  
and shall be by him delivered to the Governor for the time  
being, or, in his absence, to the Lieutenant Governor or pre-  
siding officer of the grand committee in open assembly, on  
the second day of the then next session of the General As-  
sembly, *whether the same be holden by adjournment or other-  
wise*; at which session, the person who shall be found to be  
elected Governor by a majority of the votes of the freemen  
so voting, shall be engaged, and the proceedings in relation  
thereto, and to the declaring of the election, shall be in all  
respects as is now provided by law in respect to the annual

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election and engagement of the Governor on the first Wednesday in May.

But if no person shall be found to be so elected, then the House of Representatives shall again order a new election, which shall be ordered and conducted in all respects, and as to the time and manner, as herein before provided, *and so on until a Governor is elected*, or until such proceeding shall become unnecessary by reason of the provision of law for the next annual election, and in every such case as is in this section provided for; and in all cases, the Governor of the then past year shall continue under his former engagement to be Governor, and to exercise all the powers, and perform and execute all the functions or duties of the office of Governor, until another shall be elected and engaged in his place, and shall receive such proportion of the salary as corresponds with the time he shall so serve. And if at any annual general election, where it is found that no person has been elected Governor as aforesaid, and shall be found that the freemen have also failed to elect any other general officer or officers by a majority as aforesaid, in such case the order for a new election shall be for the election of a Governor as aforesaid, and also of persons to fill such other offices for which there shall have been no election as aforesaid; all which elections shall be conducted in the same manner, having regard to the nature of the offices so to be filled, as is heretofore prescribed in respect to the election of a Governor.

SEC. 2. *And be it further enacted*, That whenever, at any annual general election, it shall be found that no Lieutenant Governor for the year then ensuing is elected by a majority of the freemen voting, and so long as there shall be no Lieutenant Governor elected, the senior Senator in rank, who shall have been duly elected and engaged, shall act as Lieutenant Governor; and in case of the death, resignation, absence from the State, or inability of the Governor, such Senator shall, during such last mentioned vacancy, absence, or inability, if there be no Lieutenant Governor as aforesaid, perform and execute all the functions and duties of Governor.

SEC. 3. *And be it further enacted*, That whenever, at any annual general election, it shall be found that not so many as six Senators, besides a Governor or Lieutenant Governor for the year then ensuing, have been elected by a majority of the freemen voting for general officers for such year, the House of Representatives shall thereupon, as soon as duly organized, order a new election, for the purpose of enabling the freemen, by their votes in their respective town meetings, to elect general officers to fill all the offices (whether of Senators or of other general officers) for which there shall have been no election for such year by the freemen as aforesaid; in which case the same proceedings, having regard,

however, to the nature of the office to be filled, shall be had in all respects, and as to times and manner, as are provided in the first section hereof, in relation to a new election for choice of a Governor; and in such case as is in this section above provided for, the general officers of the then past year, who have not been re-elected, but in whose places no others have been elected, shall, in the mean time, continue under their former engagements, respectively, to act in, and perform all the duties, and exercise all the powers and functions of the respective offices which were filled by them respectively, up to the said annual election, until others are duly elected and engaged in their places respectively; and shall be entitled, respectively, to such compensation, provided for their respective offices, as corresponds with the time they shall so serve; and in such case the Senate shall, until the places of those who have not been re-elected as aforesaid shall be filled as aforesaid, be composed of those who are newly elected and engaged, and those who have not been re-elected as aforesaid, but in whose places no others have been elected. But in all cases in which it shall be found, at the annual general election, that as many as six Senators, besides a Governor and Lieutenant Governor, *have been elected by a majority of the freemen voting as aforesaid, the two Houses, in grand committee, may elect general officers to fill the offices, if any, for which there shall have been no election by the freemen as aforesaid,* and in the same manner as they may also elect to fill vacancies when occasioned by death or resignation.

SEC. 4. *And be it further enacted,* That whenever a new election shall be ordered as herein before provided, the Speaker of the House of Representatives shall, thereupon, immediately issue his warrant to each town clerk in this State, requiring them to cause the freemen of their respective towns to be duly warned to meet in town meeting for the purpose of proceeding to such new election, and specifying the day for holding such town meetings, and the offices for which officers are to be elected; and he shall also cause the order of the House for such new election to be published in a newspaper in each county in which a newspaper is then printed, at least ten days before the time appointed for such town meetings; and if, by accident, the said warrant should not reach any town clerk, or shall not be forthcoming, the votes regularly given therein shall, nevertheless, be deemed legal, and shall be received and counted, if it shall appear that such town meeting was holden on the day prescribed in such order, and was duly warned and conducted: *Provided, however,* That the direction of such warrant shall, if issued after the organization of the city of Providence, be to the city clerk of said city, who shall cause the freemen to be warned to meet for the aforesaid purposes in their respective wards; and all votes given in such ward meetings according to the

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provisions of the law, and conformably to the meaning of this act, shall be received and counted in such elections.

True copy. Witness:

HENRY BOWEN, *Secretary.*

N.

Population and  
representation  
of each town.

The following is a list of the towns in the State of Rhode Island, the population of each town, and the representation to which each town is entitled in the popular branch of the Legislature of the State.

Names of towns.	Population.	Representation.
Providence - - -	16,833	4
Smithfield - - -	6,857	2
Scituate - - -	3,993	2
Cumberland - - -	3,675	2
New Providence - - -	3,503	2
Foster - - -	2,672	2
Cranston - - -	2,652	2
Gloucester - - -	2,521	2
Burrillville - - -	2,191	2
Johnston - - -	2,115	2
Newport - - -	8,010	6
Tiverton - - -	2,905	2
Portsmouth - - -	1,127	4
Little Compton - - -	1,378	2
New Shoreham - - -	1,185	2
Middletown - - -	915	2
Jamestown - - -	415	2
South Kingston - - -	3,663	3
North Kingston - - -	3,036	2
Exeter - - -	2,358	2
Westerly - - -	1,915	2
Hopkintown - - -	1,777	2
Richmond - - -	1,363	2
Charlestown - - -	1,284	2
Warwick - - -	5,526	4
Coventry - - -	3,851	2
West Greenwich - - -	1,817	2
East Greenwich - - -	1,590	2
Bristol - - -	3,034	2
Warren - - -	1,800	2
Barrington - - -	612	2
COUNTIES.		
Providence - - -	47,020	22
Newport - - -	16,535	20
Washington - - -	15,421	14
Kent - - -	12,685	10
British - - -	5,466	6
		72

O.

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*To the honorable Supreme Judicial Court now sitting at Providence by adjournment from the September term, A. D. 1833 :*

Application for a *habeas corpus* on the ground of unconstitutional appointment of the judges.

Respectfully complains, Amos Miner, of Providence, in the county of Providence, that he is now confined in the State's jail in Providence, and restrained of his personal liberty, by Rufus Smith, Esq., the jailer thereof, without any lawful authority whatever. He would represent that he was indicted in September, A. D. 1832, before a court assuming to be the Supreme Judicial Court of the State of Rhode Island and Providence Plantations, for murder; that, in March, A. D. 1833, he was tried before said court assuming to be the Supreme Court of said State, and convicted, and sentenced to be hung by the sheriff of the county of Providence on the fifth day of July, A. D. 1833; and that the said sheriff should confine him in said jail in said county until the said fifth day of July, A. D. 1833, and then, in some public place in said county, to be selected by said sheriff, between the hours of eight o'clock A. M. and two o'clock P. M., to hang this petitioner by the neck until he was dead. He would represent that he has ever since been confined in said jail: that the court that tried and sentenced him had no authority so to do—the supposed judges thereof having never been legally and constitutionally appointed by a grand committee of this State. He therefore prays that a writ of *habeas corpus* may be awarded, directed to the said Rufus Smith, returnable to this court forthwith, that he may be discharged from his illegal imprisonment; and he, as in duty bound, will ever pray.

AMOS MINER.

21 day term, Friday, November 22, A. D. 1833.

An application of Amos Miner, a convict in jail, under sentence of death, for writ of *habeas corpus*, was presented to the court by Christopher Robinson, Esq., and read.

22 day term, Saturday, November 23, A. D. 1833.

On the application of Amos Miner for a writ of *habeas corpus*, the court this day refused to grant the same.

STATE OF RHODE ISLAND AND }  
PROVIDENCE PLANTATIONS, } Providence, ss.

I hereby certify that the above and preceding page contains a true copy, compared by me, of the application of Amos Miner to this court for a writ of *habeas corpus*, and



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of the whole proceeding had thereon, as the same now appears on the journal of the proceedings of said court.

In testimony whereof, I have hereto set my hand, and affixed the seal of said court; this thirteenth day [L. s.] of November, in the year of our Lord one thousand eight hundred and thirty-three.

JOHN S. HARRIS, *Clerk.*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, } *November 30, 1833.*

I certify that John S. Harris, who has signed the attestation on the preceding page, is clerk of the Supreme Judicial Court for the county of Providence, in the State aforesaid, duly elected and qualified according to law; and that the seal, thereto annexed, is the seal of said court.

SAMUEL EDDY,  
*Chief Justice of said Court.*

P.

*State of Rhode Island and Providence Plantations.*

SECRETARY'S OFFICE, *December 30, 1833.*

‘Engagement’  
or oath of  
Governor, &c.  
how adminis-  
tered.

I certify that it appears from an examination of the journal of the Senate of the said State, from May, 1800, to May, 1833, that no business except what relates to the election of general officers, is transacted by the Senate until after the report of the committee appointed to count the votes for general officers.

I further certify that the official engagement of the Governor and Senators, Attorney General, and General Treasurer, is administered by the Secretary of State.

Witness: HENRY BOWEN, *Secretary.*

By his Excellency John Brown Francis, Governor, captain general; and commander in chief of Rhode Island and Providence Plantations:

Be it known that the name of “Henry Bowen,” to the aforewritten attestation subscribed, is the proper handwriting of Henry Bowen, Esq., who, at the time of subscribing the same, was Secretary of the State aforesaid, duly elected and qualified according to law: wherefore, unto his said attestation full faith and credit are to be rendered.

In testimony whereof, I have hereunto set my hand, and caused the seal of said State to be affixed, at Providence, this thirtieth day of December, in [L. s.] the year of our Lord one thousand eight hundred and thirty-three, and of independence the fifty-eighth.

JOHN BROWN FRANCIS.

By his Excellency's command:

HENRY BOWEN, *Secretary.*

Q.

*The State of Rhode Island and Providence Plantations.*

HOUSE OF REPRESENTATIVES,

*January Session, A. D. 1833.*1834.  
23d CONGRESS,  
1st Session.Protest of the  
House of Reps.  
against the elec-  
tion of A. Rob-  
bins.

The undersigned, members of the House of Representatives, entertaining an unyielding attachment and respect for the unaliened and reserved rights of the people, and firmly believing that the election of Asher Robbins to the Senate of the United States on Saturday last, by the concurrent act of the present officiating Governor and Senate, with a majority of this House, is wholly unauthorized by the constitution of this State, and repugnant to the settled and long established usages and customs thereof, deem it their imperative duty to enter their solemn protest against said election, and do hereby publicly and solemnly protest against it as an act of legislation unwarranted by any express or implied constitutional principle, and an open infringement upon, and a usurpation of, the sovereign rights of the people, to which they never yielded their assent, and by which they ought not to be bound.

1st. Because it is a settled and established principle that a grand committee for the choice of officers must be formed and constituted by a Governor and Senate, and House of Representatives, *duly elected by the people*, and be otherwise duly qualified to make choice of such officers.

2d. Because the officiating Governor and Senate, who, as a co-ordinate branch of the State Government, formed the grand committee on Saturday, and by whose co-operation with this House was effected the election of the said Robbins a Senator in Congress for six years from the 4th of March next, *are not so elected by the people*; but who assumed to exercise the functions of their offices by virtue of an act entitled "An act in addition to an act entitled an act regulating the manner of admitting freemen, and directing the method of electing officers in this State," passed in January, A. D. 1832.

3d. Because said act was intended, in the event of a failure of an election of Governor and Senate by the people, only to preserve the legislative form of the Government until an election of Governor and Senate could be made by the people, and never was intended to confer upon the Governor and Senate the power of electing others, (themselves not being elected by the people;) and does not confer upon the present officiating Governor and Senate the right or power of joining this House in grand committee for the choice of any officer, much less that of a Senator in Congress.

4th. Because the present Governor and Senate, when elected in April, 1831, were not chosen by the people with

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1st Session.

any view of electing a Senator as aforesaid, nor have they ever taken any obligation binding upon them in regard to such an election; the term of service for which they were so elected, and the oath of office then administered to them, terminating with the political year on the first Wednesday of May, A. D. 1832.

5th. Because, as a vacancy in the office of Senator does not occur until the 4th of March next, and as one or more elections of Governor and Senate by the people were specially provided for by the aforesaid act, the people might have had one or more opportunities of expressing their opinions in relation to the choice of a Senator; and as this House might have been adjourned and continued in session, from time to time, as of the annual October session, before the 4th of March, there was no necessity of proceeding in the choice of Senator at the present time.

6th. The election of Asher Robbins by the votes of the present acting Governor and Senate, therefore, in manner and form before mentioned, has virtually deprived the people of the opportunity of again expressing their wishes in regard to the choice of Senator, and is, therefore, in the opinion of the undersigned, an arbitrary infringement upon the *sovereign and reserved rights of the people*, justified and justifiable only by unauthorized legislation and usurped powers.

7th. Because the election of said Robbins was accomplished by said grand committee in the absence of members of this House whose settled opinions were known to be opposed thereto, and whose absence at this time is occasioned by the visitations of sickness.

8th. Because deference to the majority of the people imperiously required a postponement of the choice of Senator until a Governor and Senate had been duly elected by them, and by them clothed with the constitutional right of making such choice.

9th. Because, by the constitution of the United States, when a vacancy occurs in the office of Senator in the recess of the Legislature, the acting Governor (if he rightfully exercises the office of chief magistrate under the aforesaid act, and without an election by the people) is authorized to fill such vacancy by special appointment until the meeting of the next Legislature. We cannot refrain from the conclusion, therefore, that the election of Mr. Robbins was pressed at the present time with the view of screening the acting Governor from all responsibility of an act which must have brought up the constitutionality of the law by which he now assumes to administer the Government.

10th. Because it is our deliberate opinion that another choice of Senator by a Legislature, both branches of which shall have been duly elected by the people, will and must supersede the election of Mr. Robbins, and render it null and void.

Wherefore, the undersigned make this protest against the validity of said election, as an act due to themselves and to their constituents, and respectfully ask that the same may be entered on the journal of this House.

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1st Session.

James D'Wolf  
Ichabod Davis  
John James  
Hazard K. Carpenter  
Andrew F. Potter  
Job Randall  
Duty Lapham  
Dan. King  
Amasa Eddy, jr.  
Elisha R. Potter  
Christopher Allen  
William Sprague, jr.  
Rensselaer B. Smith  
Thomas Remington  
James Allen

Archibald Milikin  
William James  
Benjamin Sprague  
Rowse H. Dawley  
Benjamin P. Thurston  
Samuel Ross  
Jeremiah Sheldon  
Bennett Low  
William T. Browning  
Gideon Burgess  
Benjamin Midberry  
William Greene  
Edward Willcox  
Thomas J. Hazard  
Benjamin Wilbur.

HOUSE OF REPRESENTATIVES, *January 24, 1833.*

Read on motion of Mr. C. Allen, its reception debated, and refused—29 to 26.

GEORGE TURNER, *Clerk.*

*The State of Rhode Island and Providence Plantations.*

CLERK'S OFFICE, HOUSE OF REPRESENTATIVES,

*Newport, December 14, 1833.*

I hereby certify that the foregoing is a true copy of an original paper in this office, and of the endorsement thereon.

GEORGE TURNER,  
*Clerk of the House of Representatives.*

MAY 27.

Upon the calling of the orders of the day, this case was, on motion, taken up by the Senate for consideration.

Proceedings in  
Senate continued.

The reports of the majority and of the minority of the committee were then read, occupying until nearly half past three o'clock.

Mr. POINDEXTER then expressed a hope that the question would be immediately taken, and without debate.

Mr. WRIGHT asked for the yeas and nays, and they were ordered.

Mr. WRIGHT said he did not feel bound to say a single word that would excite debate, nor did he intend to propose any amendment, because he thought it better to take the question as proposed by the select committee in their resolution. This resolution affirmed that Mr. Robbins had been duly elected a Senator of the United States, and, if concur-

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1st Session.

red in by the Senate, the question is at once settled. If, therefore, he proposed to amend the resolution so as to make it read that Mr. Robbins is not elected, and the amendment should prevail, the next question raised would be, whether Mr. Potter has been elected. Consequently he would prefer taking the question on the resolution as reported by the committee.

The resolution submitted by the majority of the committee was in the following words :

Mr. R. declared entitled to his seat.

*Resolved*, That Asher Robbins, being duly and constitutionally chosen a Senator in Congress from the State of Rhode Island, is entitled to his seat in the Senate."

And the question being taken thereon, was decided in the affirmative, as follows :

YEAS—Messrs. Bell, Bibb, Calhoun, Chambers, Clay, Clayton, Ewing, Frelinghuysen, Hendricks, Kent, Knight, Leigh, McKean, Mangum, Naudain, Poindexter, Porter, Preston, Silsbee, Smith, Southard, Sprague, Swift, Tipton, Tomlinson, Waggaman, Webster—27.

NAYS—Messrs. Benton, Brown, Forsyth, Grundy, Hill, Kane, King, of Alabama, King, of Georgia, Linn, Morris, Robinson, Shepley, Tallmadge, White, Wilkins, Wright—16.

So Mr. Robbins was confirmed in his seat.

JUNE 12.

Mr. WRIGHT submitted the following preamble and motion, to wit :

Whereas the Hon. Elisha R. Potter did, at the commencement of the present session of Congress, cause to be laid before the Senate a commission from the Governor of the State of Rhode Island, duly authenticated, and constituting the regular *prima facie* evidence to entitle him to a seat in the Senate ; and whereas the contest for the seat of Mr. Potter was not finally decided until the 27th day of May now last past, when the said seat was awarded to the Hon. Asher Robbins : Therefore,

Motion to allow pay and mileage to Mr. Potter.

*Resolved*, That the said Elisha R. Potter is entitled to the compensation of mileage allowed by law to members of Congress, for his travel from his place of residence, in the State of Rhode Island, to the Capitol, and returning ; and also to the *per diem* allowance of a member of Congress for the time he actually attended at the city of Washington, during the contest pending before the Senate, in relation to the seat claimed by him, and occupied by the Hon. Mr. Robbins.

On the 16th of June, this resolution was referred to the Committee on the Judiciary, which, on the 19th, was, on motion, ordered to be discharged from the further consideration thereof.

It was then taken up for consideration in the Senate, and having been amended to read as follows, viz.

Whereas the Hon. Elisha R. Potter did, at the commencement of the present session of Congress, cause to be laid before the Senate *credentials authenticated by the Governor of the State of Rhode Island, declaring the election of Asher Robbins void, and that the said Potter had been elected by the Legislature a Senator for the State of Rhode Island*: And whereas the contest for the seat claimed by Mr. Potter was not finally decided by the Senate until the 27th day of May now last past, when the said seat was awarded to the Hon. Asher Robbins: Therefore,

*Resolved*, That the said Elisha R. Potter *ought, under the circumstances of the case, to be paid the compensation of mileage allowed by law to members of Congress, for his travel from his place of residence, in the State of Rhode Island, to the Capitol, and returning; and also the per diem allowance of a member of Congress for the time he actually attended at the city of Washington, during the contest pending before the Senate, in relation to the seat claimed by him, and occupied by the Hon. Mr. Robbins; and that the Judiciary Committee be instructed to prepare a bill or resolution for that purpose.*

It was decided in the affirmative: Yeas 24, Nays 22.

On the recommendation of a majority of the Committee on the Judiciary, it was, on the motion of their chairman, moved to amend the general appropriation bill by inserting a clause therein, authorizing the Secretary of the Senate to pay out of the fund appropriated by law for the pay of members, &c., the compensation authorized by the foregoing resolution.

This amendment prevailed by a vote of 20 to 19, and was engrafted into the appropriation, and passed with it; so that compensation was allowed to Mr. Potter, as to a member of the Senate.

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23d CONGRESS,  
1st SESSION.

Pay, &c. allowed Mr. P.





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